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Race Relations Law Reporter

A Complete, Impartial Presentation of Basic Materials, Including:

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
- ★ *Regulations*

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Recent Developments . . . A Summary

Education

PUBLIC SCHOOLS: *Little Rock, Arkansas*—Recent legal developments arising in connection with the desegregation of this city's Central High School are set out in chronological order in this issue (pp. 931-965). Federal court decisions approving the plan of gradual desegregation adopted by the Little Rock Board of Education under which integration of the high school, would begin in September, 1957, have been reported in previous issues (1 Race Rel. L. Rep. 851, 2 Race Rel. L. Rep. 593). Just prior to the 1957 school term, a petition was filed in an Arkansas state court to enjoin school officials from commencing integration (p. 931). The state court granted the petition after a hearing in which Governor Faubus of Arkansas appeared as a witness (p. 933). The following day the federal district court, on the request of city school officials, enjoined the enforcement of the state court's order (p. 934). The governor then, the day before the opening of the school term, ordered elements of the Arkansas National Guard into state service (p. 937) to "preserve the peace, health, safety and security" under instructions to bar admission of Negro students to previously "white" schools and vice versa (p. 942). The Little Rock Board of Education petitioned the federal district court for instructions (p. 937) and the court directed it to proceed with integration (p. 938). Two days later the Board filed a petition for suspension of the planned integration (p. 939) which the court denied (p. 940). The court ordered the United States to come into the case as *amicus curiae* (p. 941). In response the Attorney General and the United States Attorney filed a petition (p. 942) seeking an injunction against the governor and other state officials to prevent interference with the order of the court to proceed with integration. The governor filed motions and a brief contesting the participation of the United States and the court's jurisdiction (p. 944) and an affidavit of prejudice against the judge (p. 952). After hearing, an injunction was issued against the governor and other state officials restraining them from obstructing or preventing the attendance of Negro pupils at Central High School by means of the Arkansas National Guard "or otherwise" (p. 957). The governor then withdrew the troops entirely from the school. Following the outbreak of disorders and violence at the high school on the next school day, the President of the United States issued a proclamation which recited the existence of unlawful assemblages in Arkansas "obstructing the enforcement of the orders" of the district court and making it impractical to enforce the laws "by the ordinary course of judicial proceedings". The proclamation called on all persons "engaged in such obstruction of justice to cease and desist therefrom and to disperse forthwith" (p. 963). The following day, September 24, 1957, the President issued an Executive Order (p. 964) to provide "assistance for the removal of an obstruction of justice within the State of Arkansas" by calling into the federal service members and elements of the Arkansas National Guard and by the use of other federal armed forces. This order was implemented by an order of the Secretary of Defense (p. 965).

OTHER DEVELOPMENTS: The office of the President of the United States issued a statement concerning the responsibilities and duties of the executive branch of the federal government in desegregation cases (p. 929).

In another case in *Arkansas*, the Van Buren school board filed with a federal district court a progress report indicating the beginning of integration of the schools in that city in September, 1957 (p. 965). In North Little Rock, *Arkansas*, the school board suspended its plan for integration after troops were stationed to prevent integration in Little Rock (p. 1035).

In Nashville, *Tennessee*, where integration of the first grade of city schools was to begin in September, 1957, under a court-approved plan, there were additional legal developments. The federal district court, asked to rule on the application of Tennessee's "School Preference Act" to the planned integration of schools, held the act unconstitutional on its face as requiring racial separation in the schools by statute (p. 970). In another aspect of the same case the court issued a temporary injunction against John Kasper and other persons to restrain them from interfering with integration of the schools after violence, including the dynamiting of a school, had occurred (p. 976).

In *Virginia* another test of the state Pupil Placement Act involving the schools in Arlington County was brought before a federal district court. Failure to comply with the act, the court held, is no basis for denial of admission to schools (p. 987). Also in *Virginia*, another federal district court agreed to suspend its order requiring integration of schools in Charlottesville pending a ruling on the constitutionality of the Pupil Placement Act (p. 986). The *Virginia* Pupil Placement Board, however, continued to function in assigning pupils (p. 1041).

In a Dallas, *Texas*, school case the Court of Appeals for the Fifth Circuit reaffirmed, on rehearing, its ruling directing a federal district court to enter an order requiring desegregation of schools "with all deliberate speed", notwithstanding a contention that such an order would result in cutting off of state school funds for Dallas under recent Texas legislation (p. 984). The order issued by the district court requires the integration of schools by the commencement of the current mid-winter term (p. 985).

A state court in Greensboro, *North Carolina*, dismissed an appeal and petition for injunction brought by citizens who sought to reverse the action of the city school board in admitting, under the state Pupil Placement Act, Negro pupils to previously "white" schools (p. 967). The county school board in Mecklenburg County, *North Carolina*, issued a statement concerning its denial of applications for reassignment (p. 1040).

PRIVATE SCHOOLS: The Philadelphia County Orphan's Court received the "Girard College Case" on remand from the *Pennsylvania* Supreme Court. The United States Supreme Court had previously held that racial discrimination in the operation of the college by the Board of Directors of City Trusts of Philadelphia was "state action" in violation of the Fourteenth Amendment. The Orphan's Court directed the removal of the Board of Directors of City Trusts as trustee under the will of Stephen Girard and dismissed the petition of Negro boys for admission to the college (p. 992).

Civil Rights Act

The text of the Civil Rights Act of 1957, signed by the President on September 9, 1957, is set out at p. 1011. The act authorizes a federal Commission on Civil Rights, makes some amendments in former Civil Rights Acts, and provides for the protection of federal voting rights.

Transportation

Federal district courts in *Florida* (p. 995) and *Louisiana* (p. 996) ruled that statutes in those states requiring or permitting racial segregation in intrastate bus facilities are violative of the Fourteenth Amendment to the Constitution and thus unenforceable.

Parks

In New Orleans, *Louisiana*, a federal district court ruled that state statutes and municipal ordinances denying admission of Negroes to municipally owned recreational facilities are unconstitutional (p. 994). The court enjoined the enforcement of the statutes.

Litigation

A number of the acts of the 1956 Extra Session of the *Virginia* General Assembly relating to litigation and organizations in that state are included in this issue (beginning at p. 1015). These acts deal, in general, with the regulation of litigation and attorneys, solicitation of funds and other activities of persons and organizations dealing with litigation, and legislative control of some of the measures adopted.

Other Developments

A state court has issued an injunction against a boycott of merchants in Tuskegee, *Alabama* (p. 1002) reported to have begun in protest of the changing of municipal boundaries to remove Negro voters from the town. The Attorney General of *Michigan* rendered an opinion concerning the application of the state's anti-discrimination statute to golf clubs having liquor licenses (p. 1046). The *New York City* superintendent of education made a report on the proposed rezoning of schools so as to provide for some racial integration (p. 1037).

Reference

This issue contains a background study on the enforcement of federal court orders and the prevention of obstruction of courts, including the contempt powers of the courts and the use of armed forces in certain instances (p. 1051). A cumulative Table of Cases for Volume 2 is also included (p. 1081).

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REFERENCE

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PRESIDENT

EDUCATION
Public Schools—Federal Government

The Executive Office of the President of the United States issued on September 24, 1957, the following statement concerning the duties and responsibilities of the executive branch of the federal government in school desegregation cases.

1. The executive branch of the Federal Government does not participate in the formulation of plans effecting desegregation.

This function is left to the community where maximum understanding of local problems exist so that proper and effective solutions may be devised. This was clearly recognized by the United States Supreme Court when it said:

"To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system."

Although the Federal Government has no responsibility to initiate action to desegregate public schools or to formulate any plans for desegregation, the courts have made it clear that the Department of Justice, at the invitation of the Court, must participate in litigation involving public school desegregation for the purpose of assisting the Court.

2. The period of time within which any such plan should be put into effect likewise must be proposed by the local authorities and approved by the courts.

The Supreme Court held that admission of children to public schools on a nonracial basis should go forward with all deliberate speed. In requiring a "prompt and reasonable start to full compliance," the Court also made it clear that insincere or dilatory tactics could not be used to defeat constitutional protections and rights.

The executive branch of the Government does not play a part in these local deliberations or, under existing law, in the court proceedings when such plans are considered.

3. A final order of a Federal court giving effect to a desegregation public school plan must be obeyed by state authorities and all citizens as the law of the land.

The action of the Supreme Court has conclusively settled the principle that public school desegregation is, under existing constitutional provisions, the law of the land. Final orders of the Federal courts carrying out this principle must be observed.

It is the duty of the state authorities to give full aid to the enforcement of a desegregation public school plan once it is finally ordered by the Court. This obligation is not open to any doubt. It is also a required responsibility of good citizenship that every person in the community respect the law and its processes. Such observance of law is fundamental to our existence as a nation of free people under constitutional government.

4. Powers of a State Governor may not be used to defeat a valid order of a Federal court.

The Governors of the respective states have the primary responsibility for maintaining domestic order. However, under a pretext of maintaining order a Governor may not interpose military force or permit mob violence to occur so as to prevent the final order of a Federal court from being carried out.

When an obstruction of justice has been interposed or mob violence is permitted to exist so that it is impracticable to enforce the laws by the ordinary course of judicial proceedings, the obligation of the President under the Constitution and laws is inescapable. He is obliged to use whatever means may be required by the particular situation.

COURTS

EDUCATION

Public Schools—Arkansas

SUMMARY: Negro school children in Little Rock, Arkansas, brought a class action in federal district court against school officials of that city. The action sought a declaration of the rights of the plaintiffs to attend public schools without discrimination on the basis of race or color and an injunction preventing enforcement of the Arkansas constitutional and statutory provisions requiring segregation in public schools. The answer of the defendant school officials conceded the invalidity of those provisions. The school officials presented a plan for the gradual integration of the schools, beginning with the high school grades, over a period of approximately six years, to begin in 1957. The district court approved the plan as a "prompt and reasonable start" toward full integration and retained jurisdiction of the case, without granting an injunction, to supervise implementation of the plan. 143 F.Supp. 855, 1 Race Rel. L. Rep. 851 (E.D. Ark. 1956). On appeal the Court of Appeals, Eighth Circuit, affirmed. That court distinguished several decisions of other federal courts requiring earlier integration, stating that the factors in each locality must be considered and may vary and in this case it could not hold that the time allowed was unreasonable. 243 F.2d 361, 2 Race Rel. L. Rep. 593 (1957). Just prior to and at the beginning of the 1957 school term a number of legal developments occurred culminating in an order of the President sending United States armed forces to restore order and enforce the court's decree. These developments are set out in chronological order below with a brief explanation of each item.

State Court Action

Mrs. Clyde THOMASON v. Dr. William G. COOPER et al.

Chancery Court, Pulaski County, August 29, 1957, No. 108377.

On August 27, 1957, a citizen of Little Rock, Arkansas, filed a class action in an Arkansas state court seeking a temporary injunction against members of the Little Rock school board and other school officials, defendants in the prior suit. The suit sought to restrain the school officials from admitting Negroes to any school not previously set aside for that race. The petition filed is reproduced below.

Comes Mrs. Clyde Thomason and for her petition alleges and states:

1.

Plaintiff is a citizen and taxpayer of the City of Little Rock, Pulaski County, Arkansas. Plaintiff resides within the area embodied in the Little Rock Independent School District and is the mother of a child, who is required by law to enroll and attend a school under the jurisdiction and administration of the Little Rock Independent School District. The relief sought by plaintiff herein and the rights of the plaintiff which she herein seeks to enforce are joint and common to all other white families and taxpayers, living within the boundaries of the Little Rock Independent School District, and the same are so numerous that it is impossible, as well as impractical, to bring them all before this Court. Therefore, plaintiff brings this action in her own behalf and on behalf of all such persons.

2.

All of the defendants live in Pulaski County, Arkansas and individually and collectively constitute the superintendent and members of the Board of Directors of the Little Rock Independent School District.

3.

The Board of Directors of the Little Rock Independent School District have published, announced and are in the process of integrating white and colored pupils in the same school upon the beginning of the next school term, September 3, 1957. It is the announced intention of the defendants to proceed with integration until complete integration has been achieved within the Little Rock Independent School District.

4.

At the General Election in November, 1956, there was adopted, by the voters of the State of Arkansas, including this plaintiff, an act calling for an amendment to the Constitution of the United States which would prohibit the Federal Government from exercising any control over the operation of public schools in Arkansas. At the same election, the people of the State of Arkansas, including this plaintiff, approved Constitutional Amendment No. 47 which required the General Assembly of the State of Arkansas to oppose in every constitutional manner the invasion or encroachment upon the rights of the State of Arkansas and the citizens of Arkansas by the Government of the United States.

5.

As a result of the above, and in compliance with the desires expressed therein by the citizens of this state, the Legislature of the State of Arkansas enacted Acts 83, 84, 85 and 86 of 1957 whereby there was created a Sovereignty Commission of the State of Arkansas, which said Commission would have express power to guarantee the sovereignty of this state from Federal encroachment over the operation of public schools in Arkansas. Among the other provisions of the said Statutes, Act 84 of 1957 expressly prohibits the requiring of any child to enroll or attend any school wherein both white and negro children are enrolled. The defendants are presently requiring that all children, living within the jurisdiction of the Little Rock Independent School District, enroll in violation of said Act.

6.

Defendants under their announced plan, on or about September 3, 1957, intend to require the plaintiff's child to attend a school wherein both white and negro children are enrolled; and, defendants will otherwise and by other methods and means deny to the plaintiff, her child, and all others within the defendants' jurisdiction, the benefits of the aforesaid Acts enacted by the Legislature of the State of Arkansas in 1957, by effecting the announced plan of integration of the white and negro races in the public schools within the Little Rock Independent School District.

7.

Plaintiff has requested defendants to invoke the aid of the Sovereignty Commission pursuant to Act 83 of 1957 and has not had sufficient time to ascertain what action will be taken by defendants on this request. Also, in the event defendants comply with plaintiff's request, the Sovereignty Commission will not have sufficient time before the beginning of the next school year, on September 3, 1957, to act pursuant to its authority.

8.

Due to the uncertainty of the law, the conflicting court decisions and general state of confusion and unrest, there is possible danger of civil commotion if the defendants proceed with their announced plan.

WHEREFORE, plaintiff prays that the Court render a temporary order restraining the defendants, their agents, servants and employees who collectively embody the Little Rock Independent School District from requiring plaintiff's child or any other white child from enrolling in and attending a school wherein both white and negro children are enrolled, and from enrolling negro children in schools heretofore maintained exclusively for white children, and that after trial of the issues herein raised, prays that said Order be made permanent.

Arthur G. Frankel,
Attorney for Plaintiff

VERIFICATION

I, Mrs. Clyde Thomason, state on oath that the above is true and correct to the best of my information, knowledge and belief.

Mrs. Clyde Thomason

* * *

* * *

On August 29, 1957, the Arkansas state court, after hearing, ruled on the petition for an injunction against the Little Rock school officials to restrain them from admitting Negroes to previously "white" schools. The court found that there existed a probability of violence and civil commotion if integration was carried out. A temporary restraining order was issued. [The following day the federal district court enjoined the enforcement of the state court's order, see below.]

Temporary Restraining Order

REED, Chancellor.

On this day comes on to be heard the petition of plaintiff for a temporary restraining order against defendants, plaintiff appearing in person and through counsel and defendants appearing in person and through counsel, the cause being submitted on the pleadings and on testimony from which the court makes the following finding of fact:

1. Plaintiff is a citizen and tax payer of Little Rock and is a proper party to maintain the action.

2. The action is properly cast as a class suit.

3. Subsequent to the decision of the United States Supreme Court in Brown v. Board of Education holding that state laws requiring segregation of public school students by reason of race was violative of the Fourteenth Amendment, the Little Rock School Board evolved a plan under which colored pupils would be admitted to Little Rock High School beginning September, 1957 and thereafter through different grades over a period of seven years. The current school term is scheduled to begin September 3, 1957. The school board announced its intention of following the proposed plan which had been subjected to litigation in United States District Court, reviewed by the United States Court of Appeals and found to be within the scope of the mandate issued in the Brown case.

4. The court finds that plaintiff has offered testimony of considerable probative value consisting of information received through her own efforts and the testimony of Honorable Orval E. Faubus, Governor of Arkansas, tending to show that until a comparatively recent time the plan proposed by the school board for gradual integration could be well calculated to succeed without serious incident but that through certain events over which the school board had no control public sentiment has undergone a swift change and that a probability of violence and civil commotion exists in the event the plan is carried out at this particular time. This conclusion is further supported by the fact that the Little Rock School Superintendent, while endeavoring in complete good faith to bring about public acceptance of the plan for integration, has made considerable preparation to deal with violence in the event it should develop and is unable to state with any degree of certainty that violence will not develop.

5. The Chancery Court has jurisdiction of the parties and the subject matter for the sole and limited purpose of issuing whatever orders are necessary to maintain order and prevent civil commotion.

CONCLUSIONS OF LAW

1. Insofar as the relief sought in the temporary injunction proceeding is concerned the constitutionality of the various constitutional amendments and legislative acts recited in the complaint is not in issue and no decision has been reached on this subject.

2. The function of the Pulaski Chancery Court, in view of Brown v. Board of Education is limited to orders touching on restraint of conditions reasonably calculated to result in violence and civil commotion. The opinion of this court is not intended to impair or challenge the basic principle announced in Brown v. Board of Education because agreement or disagreement with such decision is not essential to decision.

This order is designed solely to preserve peace at a time when forces beyond the control of the individuals involved have created a situation which is perilous to the community and its citizens.

JUDGMENT

Upon posting of a bond by plaintiff in the sum of $250.00 the defendants are enjoined and restrained from requiring plaintiff's child or any other white child from enrolling in and attending a school where both white and negro children are enrolled and from enrolling negro children in schools subject to the jurisdiction of

Little Rock School Board or its agents which have heretofore been maintained exclusively for white children. The court retains jurisdiction for such further orders as may be necessary.

State Injunction Voided

* * *

John AARON et al. v. William G. COOPER et al.

United States District Court, Eastern District, Arkansas, Civ. No. 3113.

On August 30, 1957, following the issuance by an Arkansas state court, above, of an order temporarily restraining the Little Rock school board from implementing its integration plan previously approved by the federal district court, the school officials petitioned the federal district court to enjoin the enforcement of the state court's order. The district court issued an order making the plaintiffs in the state court action parties defendant in the district court case and enjoined the enforcement in any manner of the state court's decree.

Petition

[*The Petition filed by the school board is set out below.*]

1. In this suit the plaintiffs asked that the defendants, hereinafter referred to as "Petitioners," be required to discontinue segregation of the races in the schools operated by Little Rock School District. Petitioners pleaded a plan of gradual integration which was formulated pursuant to the rule announced in Brown v. Board of Education, 349 U.S. 294. The Plan contemplated integration of the races in the high schools of Little Rock School District as of September 3, 1957.

2. By a Decree entered herein on August 15, 1956, the said Plan was approved. The plaintiffs appealed to the United States Court of Appeals, Eighth Circuit, and there, on April 26, 1957, the decree of this court was affirmed.

3. Petitioners at all times since the Plan was formulated have proceeded in good faith in making preparations to commence integration in the high schools of Little Rock School District on September 3, 1957, and they are now ready to commence integration on that date.

4. On August 27, 1957, Mrs. Clyde Thomason, individually and as representative of the class consisting of white families and taxpayers within the boundaries of Little Rock School District, filed a suit against petitioners, said suit being styled "Mrs. Clyde Thomason, Plaintiff, v. Dr. William G. Cooper, et al., Defendants, No. 108377." A copy of the Complaint is attached, made a part hereof, and marked Exhibit "A".

5. On August 28, 1957, Petitioners filed an Answer in said Chancery Court proceeding. A copy is attached, made a part hereof, and marked Exhibit "B".

6. The suit was heard by the Honorable Murray Reed, Chancellor of the Chancery Court of Pulaski County, First Division, on August 29, 1957, and in accordance with the prayer of the Complaint he entered a temporary order enjoining petitioners from putting their integration plan into operation on September 3, 1957. A copy of the Order is attached and made a part hereof, and marked Exhibit "C".

7. As alleged in the Answer filed by petitioners in the Chancery Court of Pulaski County, the Acts which were pleaded by the plaintiff in that proceeding are violative of Article 6 of and Amendment 14 to the Constitution of the United States, and the effect of the order of injunction is to paralyze the decree of this court entered under Federal law which is supreme under the provisions of Article 6 of the Constitution of the United States.

8. To the end that petitioners may proceed with the plan approved by the decree of this court on August 15, 1956, Mrs. Clyde Thomason

should be made a party to this proceeding, individually and in behalf of the class she represents, and she and the class of persons she represents and all others should be enjoined and restrained from making any attempt to compel petitioners to observe or put into effect any injunctive order, direction or command contained in the said order of the Chancery Court of Pulaski County, and they should be enjoined and restrained from taking any steps to cause petitioners to be punished for contempt in failing to obey the said order of the Chancery Court of Pulaski County entered on August 29, 1957.

WHEREFORE, Petitioners ask that Mrs. Clyde Thomason and the class she represents be enjoined from using in any manner the Order of the Pulaski Chancery Court entered on August 29, 1957, for the purpose of preventing or interfering with the plan of petitioners to integrate the high schools of Little Rock School District on September 3, 1957, and that they be enjoined from taking any steps in said Pulaski Chancery Court which might cause petitioners to be punished for contempt in treating the order of that court as void and in proceeding to integrate on September 3, 1957, in accordance with the Plan heretofore adopted.

AMENDMENT TO PETITION

If this Court, in its discretion, should determine that any postponement of the plan of the Little Rock School District is proper and appropriate under conditions now existing, then petitioners request that this Court modify the decree of August 15, 1956, so as to define specifically the responsibilities and duties of petitioners.

FRANK E. CHOWNING
LEON B. CATLETT
RICHARD C. BUTLER
HENRY SPITZBERG
A. F. HOUSE

By /s/ A. F. House

A. F. House
314 W. Markham Street
Little Rock, Arkansas
Attorneys for
Petitioners

Opinion and Order

DAVIES, District Judge (Sitting by Assignment)

FINDINGS OF FACT

I

On August 15, 1956, this Court entered an Order approving a plan of integration adopted by Little Rock School District, wherein it is provided that integration will start in the high schools of Little Rock School District on September 3, 1957.

II

The officials of Little Rock School District have, in good faith, prepared for integration in the high schools on September 3, 1957.

III

On the 28th day of August, 1957, Mrs. Clyde Thomason, individually and in behalf of all other white families and taxpayers living within the boundaries of the Little Rock School District instituted in the Pulaski Chancery Court a suit entitled Mrs. Clyde Thomason, Plaintiff, v. Dr. William G. Cooper, et al., No. 108377, and in her Complaint she asks that the Court issue a temporary order restraining petitioners herein from requiring plaintiff's child and any other white children, from enrolling in and attending a school wherein both white and negro children are enrolled, and from enrolling negro children in schools heretofore maintained exclusively for the white children.

IV

An Answer was filed by petitioners herein alleging that the State Court had no power to issue such Orders which would interfere with the carrying out of the plan of integration of Little Rock School District, as approved by this Court.

V

On the 29th day of August, 1957, an Order was entered in the Pulaski Chancery Court granting to the plaintiff in said suit the relief therein prayed.

CONCLUSIONS OF LAW

I

The Pulaski Chancery Court is without jurisdiction to interfere with the operations of the

plan of integration of Little Rock School District as approved by this Court.

II

The Order entered by said Pulaski Chancery Court on August 29, 1957, in the said suit of Mrs. Clyde Thomason v. William G. Cooper, et al., is void and of no effect.

III

A temporary Order should be issued herein enjoining Mrs. Clyde Thomason, the Class she represents and all others from using the Decree entered in said suit in the Pulaski Chancery Court from interfering with and preventing the opening of integrated high schools in the Little Rock School District on September 3, 1957, and she and all others should be enjoined, directly and indirectly, from interfering with the operations of Little Rock School District in carrying out the plan of integration of Little Rock School District, approved by this Court on August 15, 1956.

IV

It is proper to make Mrs. Clyde Thomason, individually, and the Class she represents in the aforesaid suit in the Pulaski Chancery Court, and all others, as parties defendant herein, pursuant to the Provisions of Rule 21 of the Civil Rules of Federal Procedure.

Let Order be entered accordingly.

Dated in Little Rock, Arkansas, this 30th day of August, 1957.

ORDER

It is ordered that Mrs. Clyde Thomason, and the Class she represents, as defined in the Complaint which she caused to be filed in the Chancery Court of Pulaski County, Arkansas, in the suit of Mrs. Clyde Thomason v. William G. Cooper, et al., No. 108377, be and they are hereby made parties defendant herein pursuant to Provisions of Rule 21 of the Civil Rules of Federal Procedure.

It is further ordered:

(a) That Mrs. Clyde Thomason, and the Class she represents, and all others, be and they are hereby enjoined from using the Order of the Pulaski Chancery Court entered on August 29, 1957, in said suit, as a means of preventing or interfering with the opening of the integrated high schools in Little Rock School District, on September 3, 1957, in accordance with the Decree of this Court entered on August 15, 1956.

(b) That Mrs. Clyde Thomason, and the Class she represents, and all others, be and they are hereby enjoined from taking any steps to cause petitioners herein to be punished for contempt in failing to obey the Order of the Pulaski Chancery Court in the aforementioned suit.

(c) That Mrs. Clyde Thomason and the Class she represents, and all other persons be and they are hereby enjoined from in any manner, directly and indirectly, interfering with or hindering the actions of the petitioners in carrying out the Decree of this Court entered herein on August 15, 1956.

It is further ordered that the petitioners not be required to file any bond herein to make this Order effective.

Dated at Little Rock, Arkansas, this 30th day of August, 1957.

Governor's Action

On September 2, 1957, the day prior to the opening of the high school to be integrated under the Little Rock school board's plan of integration, the governor of Arkansas ordered National Guard troops into state service with the "mission of maintaining . . . law and order and to preserve the peace. . . ." The National Guard troops prevented the Negro school children from entering the school. [See, also, the opinion of the state attorney-general regarding the use of troops in connection with the city police, *infra* at P 1045.] The governor's proclamation follows:

STATE OF ARKANSAS
EXECUTIVE DEPARTMENT

PROCLAMATION

To all to whom these presents shall come—Greetings:

WHEREAS, The Governor of the State of Arkansas is vested with the authority to order to active duty the Militia of this State in case of tumult, riot or breach of the peace, or imminent danger thereof; and

WHEREAS, it has been made known to me, as Governor, from many sources, that there is imminent danger of tumult, riot and breach of the peace and the doing of violence to persons and property in Pulaski County, Arkansas;

NOW, THEREFORE, I, Orval E. Faubus, Governor of the State of Arkansas do hereby proclaim that a state of emergency presently exists and I do hereby order to active duty Major General Sherman T. Clinger, the Adjutant General of Arkansas, the State Militia units consisting of the Base Detachment of Adams Field and the State Headquarters Detachment at Camp Robinson, and any other units which may be necessary to accomplish the mission of maintaining or restoring law and order and to preserve the peace, health, safety and security of the citizens of Pulaski County, Arkansas.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Arkansas to be affixed. Done in office in the City of Little Rock this 2nd day of September, 1957.

s/ Orval E. Faubus
Governor

Board Asks Instruction

On September 3, 1957, the school board filed with the federal district court a petition reciting the action of the governor and requesting instructions. A "show cause" order was issued by the court.

Petition

Petitioners, the defendants in this suit, were proceeding in conformity with the plan of integration approved by the decree of this Court entered on August 15, 1956, when, on Monday, September 2, 1957, the Honorable Orval Faubus, Governor of the State of Arkansas, placed the Arkansas National Guard around Central High School in the City of Little Rock, spoke to the public of threatened violence, and stated that the public schools of Little Rock were to be operated as they had been operated in the past.

In the light of those actions, petitioners caused the following statement to be published:

"Although the Federal Court has ordered integration to proceed, Governor Faubus has said that the schools should continue as they have in the past, and has stationed troops at Central High School to maintain order.

"In view of this situation, we ask that no Negro students attempt to attend Central or any white high school until this dilemma is legally resolved."

Petitioners caused the said statement to be published because, in the exercise of their best judgment, they determined that an emergency existed; that it was the wise course to follow

as regards the welfare and educational standards of both white and Negro pupils; and at the time of making their decision it was impossible to appear before this Court to seek instructions.

WHEREFORE, Petitioners ask that this Court exempt them from any charge of contempt and instruct them as to whether they should recall the request that "no Negro students attempt to attend Central or any white high school until this dilemma is legally resolved."

FRANK E. CHOWNING
LEON B. CATLETT
RICHARD C. BUTLER
HENRY SPITZBERG
A. F. HOUSE

By /s/ A. F. House
A. F. House
314 W. Markham Street
Little Rock, Arkansas
Attorneys for
Petitioners

Order To Show Cause

DAVIES, District Judge.

It appearing to the Court that the defendants herein, Wayne Upton, Dale Alford, Henry V. Rath, R. A. Lile, Harold Engstrom, Jr., and William G. Cooper, Jr., being members of the Little Rock School Board, have requested Negro students not to attend school at Little Rock Central High School, as shown by their petition filed herein on September 3, 1957, contrary to their representations to this Court in pleadings filed herein as late as August 29, 1957, and that the said defendants have not put into effect the plan for integration of the schools as approved by Little Rock School Board on May 24, 1955, approved by this Court on August 27, 1956, and by the United States Court of Appeals for the Eighth Circuit on April 26, 1957;

It is therefore ordered that the above named defendants, members of Little Rock School Board, and Virgil Blossom, Superintendent of the Little Rock Public Schools, appear before this Court at Room 436, Federal Building, Little Rock, at 7:30 P. M. September 3, 1957, to show cause, if any there be, why the Court should not order them to put into effect forthwith the plan of integration hereinabove mentioned.

The United States Marshal shall forthwith serve a copy of this order on the defendants above named and upon Virgil Blossom, Superintendent of the Little Rock Public Schools.

Dated this 3d day of September, 1957.

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* * *

The court, on September 3, 1957, found no reason that the original plan of integration could not be carried out and directed the school officials to proceed with the plan.

Order

DAVIES, District Judge.

Wayne Upton, Dale Alford, Henry V. Rath, R. A. Lile, Harold Engstrom, Jr., William G. Cooper, members of the Little Rock School Board, and Virgil T. Blossom, Superintendent of the Little Rock Public Schools, all of whom are defendants herein, having appeared personally and by counsel, pursuant to the order of this Court entered on September 3, 1957, to show cause why the Plan of Integration of the Little Rock School Board should not be effectuated forthwith; and the Court, having considered the petition for instruction filed by said defendants on September 3, 1957, and having heard statements offered by counsel, finds:

1. Heretofore in this action said defendants submitted to this Court a Plan of Integration for the Little Rock School system encompassing the beginning of integration at the high school level on September 3, 1957, with gradual integration of the other grades thereafter; and that said plan was approved by this Court by decree entered in this cause on August 27, 1956, which was appealed to the Eighth Circuit Court of Appeals and by that Court approved on April 26, 1957.

2. On September 2, 1957, as a consequence of the actions of public authority of the State of Arkansas in stationing military guards at the Little Rock Central High School to "preserve the peace and good order," the above-named defendants reversed the position taken by them in the Plan of Integration referred to above and

requested Negro students eligible to attend the Little Rock Central High School and other high-schools not to do so until the legal dilemma was solved.

3. The evidence presented to this Court reveals no reason the original Plan of Integration approved by this Court cannot be carried out forthwith.

It is concluded that the defendants should be directed and ordered to integrate in the Little Rock School District the senior high schools immediately and without delay, and thereafter to pursue the plan heretofore approved by this Court.

It is, therefore, by the Court ordered that the defendants, and each of them, as the Little Rock School Board and as the Superintendent of Little Rock Public Schools, integrate in accordance with the plan approved by this Court the senior high school grades in the Little Rock School District forthwith.

The injunction entered by this Court on August 30, 1957, upon application of these defendants shall remain valid and in full force and effect.

Dated this 3rd day of September 1957.

* * *

Board Seeks Stay

On September 5, 1957, following the above order of the federal district court, the Little Rock, Arkansas, school officials filed a petition with the court for a temporary suspension of the integration order.

Petition

Petitioners Wayne Upton, Dale Alford, Henry V. Rath, R. A. Lile, Harold Engstron Jr. and William G. Cooper, directors of Little Rock School District, and Virgil T. Blossom, Superintendent of the Little Rock Public Schools, all of whom are defendants in this action, would respectfully ask this court to enter an order temporarily suspending enforcement of the plan of integration, which was approved by the decree of this court entered on August 15, 1956, and for grounds stated:

1. Since Central High School opened on September 3, 1957, tension has developed as between pupil groups. Some think state interference with the plan of desegregation ordered by the court is ill-advised, and others think interference with the plan is proper and appropriate.

2. The parents of school children likewise are forming into antagonistic groups, some of whom think interference is proper and others who think it is improper.

3. If the tension is permitted to increase in the absence of an understanding by all pupils and all parents as to the nature of the problem involved, education will be disrupted.

4. To the end that calmness may be restored to the point where intelligence may be substituted for emotional agitation, petitioners are of the opinion that for the good of all pupils this court should temporarily stay the order directing petitioners to proceed with said plan of integration.

WHEREFORE, petitioners ask that this court, in the exercise of its discretion, temporarily suspend enforcement of the plan of integration approved on August 15, 1956.

* * *

On September 7, 1957, the original plaintiffs in the school case filed a response to the petition to delay integration.

RESPONSE TO PETITION
TO DELAY INTEGRATION

Come the respondents, the plaintiffs herein and other members of the class represented by the plaintiffs, and in response to the Petition filed by the defendants seeking an order to suspend the enforcement of the plan of integration approved August 15, 1956, state:

1. The reasons set forth by the petitioners as the cause for requiring any delay in racial

integration in the Little Rock schools amount to apparent disagreement with the plan for integration; and, the Supreme Court of the United States in Brown v. Board of Education held that "the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them".

2. The threat of tension and the emotional agitation referred to in the petition has no bearing on this law suit at this time as it was brought about by the action of the Governor of Arkansas and the use of National Guard troops and was in defiance of the Order of this Court and is now the subject of an investigation by this Court.

WHEREFORE, respondents pray that the Petition for delay be denied and that the defendants be required to proceed forthwith in their plans for racial integration of the Little Rock schools.

WILEY A. BRANTON
THURGOOD MARSHALL
By /s/ Wiley A. Branton
Wiley A. Branton
119 East Barraque St.
Pine Bluff, Ark.
Attorneys for
Respondents

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The court, after hearing, on September 7, 1957, denied the petition for a temporary suspension of the order of integration.

DAVIES, District Judge.

[ORAL STATEMENT BY THE COURT AT THE HEARING.]

Gentlemen, in this matter let us first reexamine prior events which have culminated today in the petition of the Little Rock school directors and the school superintendent for an order temporarily suspending enforcement of the plan of integration approved by a judge of this court on August 15, 1956.

That plan was originated and conceived by the citizens of Little Rock acting by and through their own school directors. That plan was approved by this court and by the circuit court of appeals for the eighth circuit.

That plan is not and never was anything other than the plan of the duly authorized representatives of the people of Little Rock.

What did the testimony this morning disclose? Beyond the bald and unsupported statements in the petition, only the testimony of the Little Rock superintendent of schools was offered, and that bore upon the desirability of the proper education of children in the Little Rock schools with which sentiments we all must agree.

[*Testimony "Anemic"*]

The testimony and arguments this morning were, in my judgment, as anemic as the petition itself; and the position taken by the school directors does violence to my concept of the duty of the petitioners to adhere with resolution to its own approved plan of gradual integration in the Little Rock public schools.

It must never be thought that this court has not given careful consideration to this problem and all that it entails, but it must never be forgotten that I have a Constitutional duty and obligation from which I shall not shrink. This court is not persuaded that upon the tenuous showing made by the petitioners this morning that it should suspend enforcement of the petitioners' plan of integration.

[*Violence Denied*]

The chief executive of Little Rock has stated that the Little Rock police have not had a single case of inter-racial violence reported to them and that there has been no indication from sources available to him that there would be violence in regard to this situation.

In an organized society there can be nothing but ultimate confusion and chaos if court decrees are flaunted, whatever the pretext.

That we, and each of us, has a duty to conform to the law of the land and the decrees of its duly constituted tribunals is too elementary to require elaboration.

The petition of the Little Rock school district directors and of the superintendent of the Little Rock public schools for an order temporarily suspending enforcement of its plan of integration heretofore approved by this court is in all things denied.

Order

[ORDER OF SEPTEMBER 7, 1957, DENYING SUSPENSION OF INTEGRATION.]

DAVIES, District Judge.

This matter came on to be heard this date upon the petition of Wayne Upton, Dale Alford, Henry V. Rath, R. A. Lile, Harold Engstron, Jr., and William G. Cooper, Directors of Little Rock School District, and Virgil T. Blossom, Superintendent of the Little Rock Public Schools, for an order of this Court temporarily suspending enforcement of the plan of integration which was approved by the decree of this Court entered August 15, 1956.

The Respondents were represented by Mr. Wiley A. Branton, Pine Bluff, Arkansas; Mr. Thurgood Marshall of New York; and Mr. George Howard, Jr., of Pine Bluff, Arkansas.

The Petitioners were represented by Messrs. A. F. House and Richard C. Butler of Little Rock, Arkansas.

The Court having heard the testimony adduced and the arguments of counsel, and being fully advised in the premises, it is ordered:

That the petition of the Little Rock School District directors and of the Superintendent of the Little Rock Public Schools for an order temporarily suspending enforcement of its plan of integration heretofore approved by this Court is in all things denied.

Dated at Little Rock, Arkansas, this 7th day of September, A.D., 1957.

Proceedings Against Governor

On September 9, 1957, the federal district court issued an order requesting the Attorney General of the United States, and the United States Attorney for the Eastern District of Arkansas to enter the case as "friends of the court." The order directed that a petition be filed seeking an injunction against state authorities of Arkansas to prevent their interference with the prior order of the court directing the integration of the high school.

Order

DAVIES, District Judge.

On the date hereof, the court having received a report from the United States attorney for the Eastern District of Arkansas, made pursuant to the court's request, from which it appears that Negro students are not being permitted to attend Little Rock Central High School in accordance with the plan of integration of the Little Rock school directors approved by this court and by the Court of Appeals for the Eighth Circuit.

And the court being of the opinion that the public interest in the administration of justice should be represented in these proceedings and that it will be of assistance to the court to have the benefit of views of counsel for the United States as *amici curiae*, and this court being entitled at any time to call upon the law officers of the United States to serve in that capacity, now, therefore,

IT IS ORDERED that the Attorney General of the United States or his designate and the United States attorney for the Eastern District of Arkansas or his designate are hereby requested and authorized to appear in these proceedings as *amici curiae* and to accord the court the benefit of their views and recommendations with the right to submit to the court pleadings, evidence, arguments and briefs and for the further purpose, under the direction of this court, to initiate such further proceedings as may be appropriate.

IT IS FURTHER ORDERED that the attorney general of the United States and the United States attorney for the Eastern District of Arkansas be, and they are hereby, directed to file immediately a petition against Orval E. Faubus, governor of the state of Arkansas; Maj. Gen. Sherman T. Clinger, adjutant general, Arkansas National Guard, and Lt. Col. Marion E. Johnson, unit commander, Arkansas National Guard, seeking such injunctive and other relief

as may be appropriate to prevent the existing interferences with and obstructions to the carrying out of the orders heretofore entered by the court in this case.

Dated at Little Rock, Arkansas, this 9th day of September, 1957.

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In response to the above order of the district court, the United States, as *amicus curiae*, filed a petition on September 10, 1957, seeking to have the governor and other state authorities of Arkansas made parties to the original integration suit and to enjoin them from interfering with the integration of the high school.

Petition

The United States of America, amicus curiae, by Herbert Brownell, Jr., Attorney General, and Osro Cobb, United States Attorney for the Eastern District of Arkansas, files this Petition, pursuant to and in conformity with the purpose and intent of this Court's Order of September 9, 1957, against Orval E. Faubus, Governor of the State of Arkansas, General Sherman T. Clinger, Adjutant General of the State of Arkansas, and Lt. Col. Marion E. Johnson, Unit Commander of the Arkansas National Guard, alleging:

1. On August 28, 1956, this Court entered its decree and judgment in this cause, approving the plan of school integration adopted by the defendant Little Rock School District on May 24, 1955, and ordered that jurisdiction of this case be retained for the purpose of entering such order and further orders as may be necessary to obtain the effectuation of said plan of school integration. On April 26, 1957 said decree and judgment was affirmed by the United States Court of Appeals for the Eighth Circuit. 243 F.2d 361.

2. On September 2, 1957, Governor Faubus and General Clinger caused to be stationed units of the Arkansas National Guard at the Little Rock Central High School, which troops are under the command of Lt. Col. Marion E. Johnson. On or about September 2, 1957, Governor Faubus issued to General Clinger the following order:

> You are directed to place off limits to white students those schools for colored students and to place off limits to colored students those schools heretofore operated and recently set up for white students. This order will remain in effect until the demobilization of the Guard or until further orders.

Pursuant to said Order and other orders and instructions unknown to Petitioner, said units of the Arkansas National Guard from and since September 2, 1957, have been and still are forcibly preventing and restraining certain Negro students, eligible to attend classes in said Little Rock High School in accordance with said plan of school integration, from entering said school and attending classes therein. Specifically, on September 4, 1957, the following eligible Negro students were forcibly prevented by said units of the Arkansas National Guard from entering and attending classes at said school:

Gloria Ray	Minnie Brown
Jefferson Thomas	Melba Patillo
Carlotta Walls	Elizabeth Ann Eckford
Thelma Mothershed	Jane Hill
Terrance Roberts	Ernest Green

3. On September 3, 1957, this Court, upon consideration of a Petition for Instruction filed in this cause on September 3, 1957, by the defendants herein, ordered that said defendants integrate, in accordance with the plan of school integration approved by this Court, the senior high school grades in the Little Rock School District forthwith.

4. On September 7, 1957, this Court denied the application of the Little Rock School District for a stay of the Court's order of September 3, 1957.

5. The acts of Governor Faubus, General Clinger, and Lt. Col. Johnson, in preventing by means of said units of the Arkansas National Guard Negro students eligible under said plan of school integration to attend said school, from doing so, obstruct and interfere with the carrying out and effectuation of this Court's orders of August 28, 1956, and September 3, 1957, contrary to the due and proper administration of justice.

6. In order to protect and preserve the integrity of the judicial process of the Courts of the United States and to maintain due and proper administration of justice, it is necessary that Governor Faubus, General Clinger, and Lt. Col. Johnson be made additional parties defendant and enjoined from obstructing or interfering with the carrying out and effectuation of said orders of this Court.

WHEREFORE, Petitioner prays the Court to make said Governor Faubus, General Clinger, and Lt. Col. Johnson additional parties defendant and to enter a preliminary injunction and a permanent injunction enjoining and restraining Governor Faubus, General Clinger, and Lt. Col. Johnson, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, from obstructing or preventing by means of said units of the Arkansas National Guard or otherwise, Negro students eligible under said plan of school integration to attend the Little Rock Central High School, from doing so, and from otherwise obstructing or interfering in any way with the carrying out and effectuation of said orders of this Court.

THE UNITED STATES OF AMERICA,
AMICUS CURIAE

By Herbert Brownell, Jr.
Attorney General of the United States
Osro Cobb
United States Attorney

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On September 10, 1957, the district court entered an order making the governor and other Arkansas state officials parties defendant in the integration suit and set the petition for injunction for hearing.

Order

DAVIES, District Judge.

It appearing from the Petition of the United States, as amicus curiae, by Herbert Brownell, Jr., Attorney General, and Osro Cobb, United States Attorney for the Eastern District of Arkansas, filed in conformity with the purpose and intent of this Court's order of September 9, 1957, that it is in the interest of the proper administration of Justice that Orval E. Faubus, Governor of the State of Arkansas, General Sherman T. Clinger, Adjutant General of the State of Arkansas, and Lt. Col. Marion E. Johnson, Unit Commander of the Arkansas National Guard, should be made additional parties defendant to prevent the continued obstruction of, and interference with, the carrying out and effectuation of the orders of this Court entered in this cause on August 28, 1956, and September 3, 1957;

NOW, THEREFORE, pursuant to Rules 15(d) and 21, F.R.C.P., it is hereby ordered:

1. Orval E. Faubus, Governor of the State of Arkansas, General Sherman T. Clinger, Adjutant General of the State of Arkansas, and Lt. Col. Marion E. Johnson, Unit Commander of the Arkansas National Guard, are hereby added as, and made, parties defendant in this cause;

2. Summons and a copy of said Petition and this Order shall be served forthwith upon said Governor Faubus, General Clinger, and Lt. Col. Johnson, and upon the plaintiffs and the other defendants herein;

3. A hearing upon the entry of the preliminary injunction prayed for in said Petition, is hereby set for 10 a.m., September 20, 1957, or as soon thereafter as may be heard by the Court, at Room 436, Federal Building, Little Rock, Arkansas.

DATED: September 10, 1957.

Governor Moves To Dismiss

On September 10, 1957, the governor and other state officials moved to dismiss the petition of the United States. A brief in support was offered. The motion was denied.

Motion to Dismiss

Respondents, Orval E. Faubus, Governor of the State of Arkansas, Gen. Sherman T. Clinger, Adjutant General of the State of Arkansas, and Lieut. Col. Marion E. Johnson, unit commander of the Arkansas National Guard, moved the court to dismiss the petition of the United States of America filed herein on September 10, 1957 and for grounds stated:

1. The court was without authority to make the order herein dated September 10, 1957.

2. The petition was illegally and improperly filed herein and because it relates to matters of a different nature from the subject involved in the original action.

3. The petition was prematurely filed under Rule 15 (d) of the Rules of Civil Procedure for the United States District Courts.

4. The petitioner, the United States of America, is wholly without authority to file and maintain this action against the respondent, and the court is wholly without jurisdiction to entertain such petition or to grant any relief thereon.

5. The petitioner, seeking a preliminary injunction and a permanent injunction, is not the real party in interest in this litigation and, for this reason, is without authority to maintain the action set forth in the petition.

6. This court is wholly without jurisdiction of the person of respondents and the subject matter of the petition, because

(a) The petition is in truth and in fact an attempted action against the sovereign state of Arkansas. The state of Arkansas is actually the real respondent and party in interest and this court has no jurisdiction of an action against the state of Arkansas;

(b) This court is wholly without jurisdiction to question the judgment of discretion of the respondent, Orval E. Faubus, the Governor of Arkansas, and the other respondents subordinate to him, in performing their duties made mandatory upon them by the Constitution and laws of the state of Arkansas.

Tom Harper, Fort Smith
Kay Matthews, Little Rock
Walter L. Pope, Little Rock
Attorneys for Respondents

Brief for Governor

The original action herein was one for the protection of private rights. Until September 10, 1957, it continued to be an action between private litigants involving purely private rights, i. e., the rights of the plaintiffs to attend a particular school of their choice.

The order of this court dated September 10, 1957, invited the Attorney General and the United States Attorney to appear amicus curiae and authorize them as such to submit pleadings. The order then directed them to file a petition seeking an injunction against the Governor of Arkansas and two officers of the Arkansas National Guard. The respondents contend that the court was wholly without jurisdiction to make its order dated September 10, 1957, and, further, that the court is without jurisdiction to entertain the petition of the United States or to grant any relief thereon.

If the Attorney General and the United States Attorney are truly amici curiae, they have no right as such to file petitions or otherwise to seek any affirmative relief. It is axiomatic that amici curiae are not litigants, but are merely advisers to the court. The fact that the court authorized and directed the filing of the petition can add nothing to their status as amici curiae. If they are truly amici curiae, the court has no jurisdiction by order to give them the status of litigants.

In Birmingham Loan and Auction Company v. First National Bank of Anniston, 100 Alabama 249, 13 So. 945, 946, the court said:

"An amicus curiae in practice is one who, as a stander-by, when a judge is doubtful or mistaken in a matter of law, may inform

the court. Bouv. Dict. 'He is heard only by the leave and for the assistance of the court, upon a case already before it. He has no control over the suit, and no right to institute proceedings thereon, or to bring the case from one court to another by appeal or writ of error.' Martin v. Tapley, 119 Mass. 116; No. 1 Lawson, Rights, Rem. and Pr. p. 262, ¶156."

In American Jurisprudence, volume 2, page 679, the following appears:

"* * * an amicus curiae is heard only by leave and for the assistance of the court upon a case already before it. He has no control over the suit and no right to institute any proceedings therein. It seems clear that an amicus curiae cannot assume the function of a party in an action or proceeding pending before the court, and that, ordinarily, he cannot file a pleading in a cause. An amicus curiae is restricted to suggestions relative to matters apparent on the record or to matters of practice. His principal function is to aid the court on questions of law."

On page 682 the following appears:

"An amicus curiae has no right to except to the rulings of the court; and if he takes such exceptions, they cannot avail on appeal. He has no right to complain if the court refuses to accept his suggestions, for it is not the function of an amicus curiae to take upon himself the management of a cause and assume the functions of an attorney-at-law."

The petition filed herein by the United States purports to be filed by the United States as amicus curiae. It is clear that the United States, as amicus curiae, has no right to ask for the joinder of additional parties and the entry of an injunction against such parties, for, in so doing, the United States becomes a litigant and not a "friend of the court." It is apparent from the order dated September 10, 1957, and from the petition filed by the United States that it is the intent of the court and of the United States that the United States become an actual litigant in this controversy under the guise of amicus curiae. The United States has no right to intervene in this action as a litigant, and the court has no jurisdiction to order its intervention. The court has no jurisdiction to entertain a petition by the United States seeking to aid private litigants in the enforcement of private rights.

If the United States had no right to intervene, and if the court has no jurisdiction to consider the intervention, the court's order of September 10 cannot create jurisdiction to consider the petition whether the United States be considered a litigant or whether it be considered a friend of the court.

[*Civil Rights Act of 1957*]

The Congress recently had before it legislation that would have vested jurisdiction in District Courts of the United States to entertain petitions such as the one filed in this case. We refer to H.R.6127, commonly known as the "Civil Rights Bill." Part three of the bill as introduced and passed by the House would have added two paragraphs to Section 1980 of the Revised Statutes (42 U.S.C. 1985). The proposed new paragraphs are quoted as follows:

"Fourth. Whenever any persons have engaged or there are reasonable grounds to believe that any persons are about to engage in any acts or practices which would give rise to a cause of action pursuant to Paragraphs First, Second, or Third, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

"Fifth. The District Courts of the United States shall have jurisdiction of proceedings instituted pursuant to this action and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law."

The quoted paragraph authorized intervention by the United States in controversies involving civil rights and vested jurisdiction in the District Courts of the United States to entertain actions for injunctions filed by the United States. The proposed amendment to Section 1980 of the Revised Statutes was stricken from the bill in the Senate and the House thereafter concurred. The question of conferring jurisdiction in pro-

ceedings such as this has been considered by the Congress and it, after careful deliberation, refused to extend the jurisdiction of the District Courts. The Civil Rights Bill was approved on September 9, 1957.

The District Courts of the United States have only such jurisdiction as is expressly conferred on them by the Congress. The Congress has expressly refused to confer jurisdiction on such courts to entertain petitions for injunction by the United States in civil rights action.

[*Federal Rules of Civil Procedure*]

In the court's order dated September 10, 1957, the court directed that pursuant to Rule 15 (d) and Rule 21 F. R., C. P., the respondents be made parties defendant in this cause. The petition recites in the first paragraph that it is being filed pursuant to and in conformity with the purpose and intent of the court's said order.

It is apparent that the petition was not filed in compliance or conformity to the provisions of Rule 15 (d), which provides as follows:

> "Supplemental pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefore."

It must be admitted that the provisions of this rule have not been complied with. No party to this suit appeared before the court and no notice was given as required by the rule.

It will be observed that subdivision (d) of Rule 15 is headed "supplemental pleading." The courts have frequently had occasion to determine what pleadings are qualified to be filed thereunder. District Judge Hulen, in the case of General Bronze Corporation, et al., versus Cupples Products Corporation, et al., 9 F. R. D. 269, pointed out that the plaintiffs sought permission to file a supplemental complaint under Rule 15 (d) by which infringement of a patent, granted subsequent to filing the original complaint, is charged, and that the defendants resist the move claiming the supplemental complaint would introduce a new and independent cause of action. Since it was apparent that the so-called supplemental complaint would introduce a new and independent cause of action, he devoted the remainder of the opinion, which is not at all voluminous, to a question of the applicability of the rule. We quote sparingly from this opinion:

> "The trial court has wide discretion in allowing amendments of and to pleadings. Liberality rather than strictness should be the guide. Even a liberal interpretation will not authorize a supplemental pleading if it does not meet certain requirements laid down by the cases.
>
> "The case of Berssenbrugge v. Luce Manufacturing Company, D. C., 30 F. Supp. 101, a patent case, sustains defendants' position. The supplemental complaint sought to introduce 'an act of infringement upon a patent entirely different from that which formed the basis of the original action or complaint.' The District Court refused to permit introduction by supplemental bill of a new cause of action. This case was decided shortly after adoption of the new Federal Rules of Civil Procedure and held the new rule was substantially the same as its predecessor and its language is clear enough to exclude any thought of a new cause of action."
>
> "It is our conclusion that if plaintiffs desire to litigate the subject matter of the supplemental complaint they should initiate an action to that end."

It is too plain for argument that Rule 15 (d) is designed only to permit a party to seek permission to file a supplemental pleading. District Judge Hulen cites in further support of his ruling the case of Fierstein v. Piper Aircraft Corporation, D. C. 79 F.Supp. 217. See also Ebel v. Drum, D. C. Mass., 1944, 55 F.Supp. 186; and Magee v. McNany, D. C. Pa., 1950, 10 F. R. D. 5.

[*Rule 21*]

In the court's said order of September 10, in compliance with which this petition is filed, it is stated that the order was made also pursuant to Rule 21, F. R. C. P.:

> "Misjoinder and nonjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim

against a party may be severed and proceeded with separately."

It is obvious, as was stated in the case of Truncale v. Universal Pictures Company, D. C. N. Y., 1949, 82 F.Supp. 576, that this rule is intended to permit the bringing in of a person or persons who, through inadvertance, mistake or some other reason, had not been made a party and whose presence as a party was necessary or desirable to effectuate the relief prayed for in the original action.

The original action in this case was on the part of John Aaron and others, plaintiffs, seeking to enter certain schools in this city, against William G. Cooper and others, school directors. It is inconceivable that a contention can be made, or will be made, that the respondents in this case were necessary parties in that action. Rule 21 could not possibly apply to them and does not afford any support for the action of the court in ordering them to be made parties. It is true that Rule 21 provides that misjoinder of parties is not grounds for dismissal of an action but here the United States is not such a party to this action as would be entitled to affirmative relief and it cannot become such a party to this action as would be entitled to affirmative relief and it cannot become such a party. It is well settled that the United States can become a party litigant only where there is a Federal statute expressly authorizing it to do so, and respondents submit there is not in existence any statute authorizing the United States to become a party in an action such as we have here. Indeed, as pointed out otherwise in this brief, the Congress has quite recently expressly refused to sanction the presence of the United States as a party litigant in cases of this particular nature.

[*No Jurisdiction Over State*]

Even if the United States could be said to have a right to become a party in a position of plaintiff seeking relief against these respondents, then as we stated elsewhere the result would be an action between the United States of America and the sovereign state of Arkansas of which this court clearly could not have jurisdiction.

The petition of the United States should be dismissed on the further ground that the United States is not the real party in interest. As heretofore stated, this action is one for the protection of purely private rights. It is true that these rights arise under the Constitution of the United States, but the United States has no real interest in this action. We quote from vol. 43 C. J. S., injunctions, No. 35, as follows: "In order to be entitled to an injunction complainant must be the real party in interest."

Cited in support of this statement are:

Knickerbocker Ice Company v. Sprague, 4 F.Supp. 499; Lehmaier v. Wadsworth, 191 A. 539, 122 Conn. 571; Weber v. City of Cheyenne, 97 P.2d 667, 55 Wyo. 202; Noble v. One Sixty Commonwealth Avenue, 19 F.Supp. 671.

The United States cannot justify its intervention in this action on the ground that its assistance is needed to uphold the authority of the court. If the present respondents have violated any orders of this court there is a plain and adequate remedy by way of contempt. Further, the plaintiffs are given a right of action for damages under the provisions of Title 42 U. S. C. No. 1985. Presumptively, the United States is of opinion that the present respondents have not violated any orders of this court. Therefore it seeks to obtain a direct order against these respondents, and we submit that the United States, not being a real party at interest, is not entitled to seek the relief prayed in the petition.

[*Sovereign Immunity*]

Respondents further contend that even assuming that the United States is a proper party in its action, then this court is without jurisdiction because the action would be one between the United States and a state; and jurisdiction to entertain such an action is vested under the Constitution solely in the Supreme Court of the United States. In Larson v. Domestic and Foreign Commerce Corporation, 337 U. S. 682, 93 L.Ed. 1628, the Supreme Court announced the principles to be applied in determining whether an action against a government officer is in fact an action against the sovereign. It said:

> "If the denomination of the party defendant by the plaintiff were the sole test of whether a suit was against the officer individually or against his principal, the sovereign, our task would be easy. Our decision then would be that the United States is not being sued here because it is not named as a party. This would be simple and would not leave room for controversy. But controversy there has been, in this field above all others, because it has long been established that the crucial question is

whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign. In a suit against the officer to recover damages for the agent's personal actions that question is easily answered. The judgment sought will not require action by the sovereign or disturb the sovereign's property. There is, therefore, no jurisdictional difficulty. The question becomes difficult and the area of controversy is entered when the suit is not one for damages but for specific relief: i. e., the recovery of specific property or monies, ejectment from land or injunction either correcting or restraining the defendant officer's actions.

"In each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained. As indicated, this question does not arise because of any distinction between law and equity. It arises whenever suit is brought against an officer the relief sought from him is not compensation for an alleged wrong but rather the prevention of discontinuance, in rem, of the wrong. In each such cases the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the government, but because it is in substance, a suit against the government over which the court, in the absence of consent, has no jurisdiction.

"The relief sought in this case was not the payment of damages by the individual defendant. To the contrary, it was asked that the court order the War Assets Administrator, his agents, assistants, deputies and employes and all persons acting under their direction, not to sell the coal involved and not to deliver it to anyone other than the respondent. The District Court held that this was relief against the sovereign and therefore dismissed the suit. We agree." (pp. 1634, 1635.)

[*Jurisdiction In Supreme Court*]

Since the intervention of the United States seeks to enjoin the chief executive of the State of Arkansas from performing acts in his official capacity, the suit in effect asks an injunction against the sovereign State of Arkansas. It, therefore, is an action between the United States and the State of Arkansas, and jurisdiction to entertain such an action is vested only in the Supreme Court of the United States.

Respondents submit, regardless of other points upon which a dismissal of this action must be made, it should stand out crystal clear that this court is wholly without jurisdiction on the petition of any person, the Government or any other party, to question the judgment and discretion of the respondent, Orval E. Faubus, Governor of Arkansas. This point was squarely determined in Moyer v. Peabody, 212 U. S. 78, 53 L.Ed. 410. There Mr. Justice Holmes, speaking for the Supreme Court of the United States, said:

> "When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."

[*Powers of Governor*]

It is not alleged in the so-called petition and cannot be properly alleged that the Governor of Arkansas, in performing the action complained of, acted beyond his constitutional powers as chief executive of the state. The Arkansas Constitution of 1874, Article 6, Section 2, provides that the supreme executive power of the state is vested in the Governor, and Article 6, Section 6, provides that the Governor is the commander in chief of the military forces of the state. Article 11, Section 4, provides that when the General Assembly is not in session the Governor shall have the power to call out the militia to "preserve the public peace in such manner as may be authorized by law."

The identical language of Article 11, Section 4, of the Arkansas Constitution has been enacted by the General Assembly into law in Section 12, Act 85 of the Acts of Arkansas for 1929 (11-112 Arkansas Statutes 1947, annotated). The same act in Section 14 (11-114, Arkansas Statutes 1947, annotated) confers upon the Governor the power "in case of insurrection, invasion, tumult, riot or breach of the peace, or imminent danger thereof, or to preserve the public health and se-

curity and maintain the law and order, to order into the active service of the state any part of the militia that he may deem proper."

Section 8 of the same act (11-108 Arkansas Statutes 1947, annotated) provides that the active militia shall consist of the organized and uniformed military forces known as the National Guard.

Therefore, it should follow from the above that the Governor, in calling out the National Guard and in giving it orders to preserve the public peace, acted wholly and completely within the authority conferred upon him by the Constitution and laws of Arkansas and in so doing he was but performing a duty imposed upon him by law. As pointed out in Moyer v. Peabody supra, the Governor is the final judge of the use of the military to suppress violence within the state. That being so, this court cannot substitute its judgment for the judgment of the Governor. Sterling v. Constantine contains nothing contrary to this proposition.

[*Sterling Case Distinguished*]

There a wholly different state of facts prevailed, as must be obvious to anyone who reads the Sterling decision and compares it with Moyer v. Peabody and compares it with the allegations of the so-called petition of the United States in this case. In the Sterling case the Governor was acting wholly and solely to protect the claims of the parties who were one side of a contested litigation. That is not the case here, as should be evident to anyone who reads all of the pleadings and orders made in this case from its inception down to this moment. The Governor's right to call out the National Guard to preserve the public peace is unquestionable and Moyer v. Peabody thoroughly establishes the proposition that his judgment and discretion in so doing cannot be called into question by the judiciary.

If anything further were needed, we have only to look to the concluding language of the court in Strutwear Knitting Company v. Olson, Governor, 13 F.Supp. 384 (D. C. Minn.), cited by the petitioner, where a three-judge court said (L. C. 392):

> "We are satisfied that we are without power to command the Executive branch of the state Government to perform the duties imposed upon it with respect to the maintenance of law and order. The exclusive discretion in that regard is vested in the Executive."

Needless to say, if the courts cannot command the chief executive of a state to perform his duties imposed upon him under the state law, the court is equally powerless to restrain him in the performance of those duties.

We respectfully submit that the petition should be dismissed.

Thomas Harper, Kelley Building,
Fort Smith, Ark.,
Kay Matthews, Boyle Building,
Little Rock, Ark.,
Walter L. Pope, Rector Building,
Little Rock, Ark.,
Attorneys for Respondents

Order

DAVIES, District Judge.

This cause having been heard on the Motion of Respondents Orval E. Faubus, Governor of the State of Arkansas, General Sherman T. Clinger, Adjutant General of the State of Arkansas, and Lt. Col. Marion E. Johnson, Unit Commander of the Arkansas National Guard, to dismiss the petition of the United States of America filed herein on September 10, 1957; now therefore,

IT IS HEREBY ORDERED that the Motion of Respondents, Orval E. Faubus, Governor of the State of Arkansas, General Sherman T. Clinger, Adjutant General of the State of Arkansas, and Lt. Col. Marion E. Johnson, Unit Commander of the Arkansas National Guard, to dismiss the petition of the United States of America filed herein on September 10, 1957 be, and it hereby is, denied.

Dated September 21st, 1957.

Plaintiffs' Supplemental Complaint

On September 11, 1957, the original plaintiffs in the school case filed with the federal district court a motion to file a supplemental complaint and to add additional defendants. The motion was subsequently granted and heard with other motions in the case. The motion, complaint filed and order of the court are set out below.

Motion

MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT AND TO ADD ADDITIONAL DEFENDANTS

PLAINTIFFS move the Court for an order permitting them to file the attached Supplemental Complaint and to serve same upon Governor Orval E. Faubus, Governor of the State of Arkansas, Major General Sherman T. Clinger, Adjutant General of the National Guard and Lt. Col. Marion E. Johnson, Troop Commander and direct said defendants to answer said Supplemental Complaint on or before Friday, September 20th, 1957.

Respectfully submitted,
Wiley A. Branton
Pine Bluff, Arkansas
Thurgood Marshall
107 West 43rd Street
New York 36, N. Y.
By /s/ Wiley A. Branton
Wiley A. Branton
119 E. Barraque St.
Pine Bluff, Ark.
Attorneys for
Plaintiffs

Supplemental Complaint

THE PLAINTIFFS present this their Supplemental Complaint herein, leave having been granted by this Court so to do on September 20, 1957, against Governor Orval E. Faubus, Governor of the State of Arkansas, and Major General Sherman T. Clinger, Adjutant General of the National Guard, and Lt. Col. Marion E. Johnson, Troop Commander, and says:

(1) Subsequent to the orders of this Court heretofore entered, requiring the original defendants to proceed with their plan for integrating the public schools of Little Rock, Arkansas, the orders of this Court have been flaunted and defendants have been prevented from carrying out said orders, and plaintiffs and members of the class they represent have been forcibly denied rights guaranteed by the United States Constitution.

(2) This Court received on September 9, 1957, from the United States Attorney for the Eastern District of Arkansas a complete report of investigation conducted by the Department of Justice at the request of the Court in connection with any interference with, or obstructions to, the carrying out of orders of this Court in this case.

(3) After receiving the said report from the United States Attorney for the Eastern District of Arkansas, this Court on September 9, 1957, entered its order directing the Attorney General of the United States and the United States Attorney for the Eastern District of Arkansas, to appear Amici Curiae and to bring injunction proceedings against certain officials of the State of Arkansas.

(4) This Court ordered the Attorney General of the United States and the United States Attorney for the Eastern District of Arkansas, to bring action against Orval E. Faubus, Governor of the State of Arkansas, Major General Sherman T. Clinger, Adjutant General of the National Guard, and Lt. Col. Marion E. Johnson, Troop Commander.

(5) The interest of the plaintiffs and the class they represent in obtaining an education in conformance with the Constitution and laws of the United States has previously been decided by this Court.

WHEREFORE, plaintiffs pray that Orval E. Faubus, Governor of the State of Arkansas, Major General Sherman T. Clinger, Adjutant General of the National Guard, and Lt. Col. Marion E. Johnson, Troop Commander, be made party defendants and that this honorable court issue a temporary restraining order or preliminary injunction against Orval E. Faubus, Governor of the State of Arkansas, Major General Sherman T. Clinger, Adjutant General of the

National Guard, and Lt. Col. Marion E. Johnson, Troop Commander, restraining them and each of them, their agents and servants from any action which prevents the defendants from carrying out existing orders of this Court.

AND that after notice and hearing, the said Orval E. Faubus, Governor of the State of Arkansas, Major General Sherman T. Clinger, Adjutant General of the National Guard, and Lt. Col. Marion E. Johnson, Troop Commander, be enjoined from using the National Guard or any other force of the State of Arkansas to prevent orders of this Court from being carried out.

AND for such other and further relief as to the Court may appear proper.

Respectfully submitted,
Wiley A. Branton
Pine Bluff, Arkansas
Thurgood Marshall
107 West 43rd Street
New York 36, N. Y.
By /s/ Wiley A. Branton
Wiley A. Branton
119 E. Barraque St.
Pine Bluff, Arkansas
Attorneys for
Plaintiffs

Order

ORDER GRANTING LEAVE TO FILE SUPPLEMENTAL COMPLAINT AND TO ADD ADDITIONAL DEFENDANTS

DAVIES, District Judge.

THIS CAUSE came on to be heard on plaintiffs' Motion For Leave To File Supplemental Complaint And To Add Additional Defendants herein, and the Court being full advised, it is ordered:

(1) THAT plaintiffs be given leave to file their Supplemental Complaint and to add additional defendants.

(2) THAT Governor Orval E. Faubus, Governor of the State of Arkansas, Major General Sherman T. Clinger, Adjutant General of the National Guard, and Lt. Col. Marion E. Johnson, Troop Commander, be added as party defendants.

(3) It appearing to the Court that the injunctive relief sought in plaintiffs' Supplemental Complaint is substantially the relief already petitioned of the Court in a petition filed on behalf of the United States of America, which said petition has been set down for formal hearing at 10:00 a.m., on September 20, 1957, or as soon thereafter as same may be reached by the Court, at Room 436, Federal Building, Little Rock, Arkansas. It is ordered that hearing on plaintiffs' Supplemental Complaint seeking injunctive relief be also heard at 10:00 a.m. on September 20, 1957, or as soon thereafter as same may be reached by the Court, at Room 436, Federal Building, Little Rock, Arkansas.

Dated this 20th day of September 1957.

Motions to Quash Service

On September 19, 1957, officers of the Arkansas National Guard who had been subpoenaed moved to quash the service of subpoena. The motions were denied by the court.

MOTION TO QUASH
SERVICE OF SUBPOENA

Comes General Sherman T. Clinger and appearing solely for the purpose of this Motion and for no other purpose states:

1. He has been served with a subpoena herein commanding his attendance as a witness herein on behalf of the United States, and to produce certain documents described therein at 10:00 o'clock A. M., September 20, 1957.

2. At the time said subpoena was served upon him, he was engaged in the active military service of the State of Arkansas as commanding officer of the Arkansas National Guard, and he is now engaged in said service and will be at the time and date aforesaid.

3. He is exempt from service of process of this Court and the attempted service of said subpoena upon him is wholly void because of the laws of the State of Arkansas, specifically

Section 11-1002, Ark. Stats. 1947, Annotated, to-wit:

"No person belonging to the active Militia of the State shall be served with any civil process while going to, remaining at, or returning from any place at which he may be required to attend for military duty."

4. Therefore, he prays said subpoena and the attempted service thereof be quashed.

/s/ Thomas Harper
Fort Smith, Arkansas
/s/ Kay Matthews
Little Rock, Arkansas
/s/ Walter L. Pope
Little Rock, Arkansas
Attorneys for General
Sherman T. Clinger

MOTION TO QUASH
SERVICE OF SUBPOENA

Comes Lieutenant Colonel Marion E. Johnson and appearing solely for the purpose of this Motion and for no other purpose states:

1. He has been served with a subpoena herein commanding his attendance as a witness herein on behalf of the United States at 10:00 o'clock A. M., September 20, 1957.

2. At the time said subpoena was served upon him, he was engaged in the active military service of the State of Arkansas as an officer of the Arkansas National Guard, and he is now engaged in said service and will be at the time and date aforesaid.

3. He is exempt from service of process of this Court and the attempted service of said subpoena upon him is wholly void because of the laws of the State of Arkansas, specifically Section 11-1002, Ark. Stats. 1947, Annotated, to-wit:

"No person belonging to the active Militia of the State shall be served with any civil process while going to, remaining at, or returning from any place at which he may be required to attend for military duty."

4. Therefore, he prays said subpoena and the attempted service thereof be quashed.

/s/ Thomas Harper
Fort Smith, Arkansas
/s/ Kay Matthews
Little Rock, Arkansas
/s/ Walter L. Pope
Little Rock, Arkansas
Attorneys for Lt. Col.
Marion E. Johnson

Order

DAVIES, District Judge.

This cause having been heard on the Motions of General Sherman T. Clinger and Lt. Col. Marion E. Johnson to Quash Service of Subpoenas, and it appearing that Section 11-1002, Arkansas Statutes, 1947, does not grant said General Sherman T. Clinger and Lt. Col. Marion E. Johnson immunity from the process of this Court; now therefore,

IT IS HEREBY ORDERED that the Motions of General Sherman T. Clinger and Lt. Col. Marion E. Johnson to Quash Service of Subpoenas be, and they hereby are, denied.
Dated September 21st, 1957.

Governor's Response

On September 19, 1957, the governor of Arkansas filed an affidavit in the federal district court requesting that the judge before whom the case was pending recuse himself from further participation on the grounds of prejudice and bias. The United States filed a motion to strike the affidavit of prejudice, together with a memorandum of points and authorities in support. The motion of the United States to strike was granted.

Affidavit

Orval E. Faubus, Governor of the State of Arkansas, states that he is a respondent to this action and he makes and files this affidavit pursuant to title 28 U. S. C. A. Sec. 144.

Affiant, Orval E. Faubus, respondent herein, on his oath states that he is informed and verily believes that the judge before whom this action is pending, the Honorable Ronald N. Davies, has a personal prejudice against him, and has a personal bias in favor of the plaintiffs, John Aaron, et al., and the United States of America, amicus curiae.

Affiant states that he did not file this affidavit ten days before the beginning of the present term of court for the reason that he had not at that time been made respondent in this case, and that he was not, in fact, made respondent herein until September 10, 1957. On that date the United States of America, by Herbert Brownell, Jr., Attorney General of the United States, pursuant to an order herein of Judge Davies directing him so to do, filed herein a petition praying that affiant and others be made respondents and for an injunction against them. This affidavit is made and filed as soon as possible after affiant and others were made respondents to this litigation, and as soon as the facts of the bias and prejudice of Judge Davies became known to him and it is not made for purposes of delay or for any other purposes than that stated herein, and further the same is filed as soon, according to affiant's information and belief, as the same could be considered by the judge of this court. The affidavit is accompanied by a certificate of counsel of record that said affidavit and application are made in good faith.

[*Bias Charged*]

The affiant verily believes that the judge has shown a personal prejudice against him, and a personal bias in favor of the plaintiffs, and the United States of America, amicus curiae, in that he has privately conferred with the favored litigants, considered extra-judicial statements, indicated a preconceived opinion, and has advised favored litigants as to what courses of action to follow, all of which are reflected as follows:

(1) On or about September 3, 1957, the press reported that members of Attorney General Brownell's staff of the Justice Department in Washington, D. C., had been "in touch" with Federal District Judge Ronald N. Davies. (Arkansas Democrat, September 3, 1957.)

(2) On or about September 7, 1957, the press attributed to United States District Attorney, Osro Cobb, the statement that Mr. Cobb had received and read certain Federal Bureau of Investigation reports on a purported investigation of the affiants' activities and was making interim reports daily to Judge Davies.

(3) On or about September 6, 1957, the press reported:

> "Yesterday morning Blossom went into Judge Davies' office and remained there about fifteen minutes. He was accompanied by United States District Attorney, Osro Cobb, United States Marshal Beal Kidd, and A. F. House, attorney for the school board. None would comment on the meeting." (Arkansas Gazette, September 6, 1957.)

(4) On or about September 4, 1957, the press reported that Judge Davies conferred with personnel of the United States District Attorney's office about the case, but no statement was issued. (Arkansas Democrat, home edition, September 3, 1957.)

[*F. B. I. Report*]

(5) On a date unknown to the respondent, the Federal Bureau of Investigation presented a report to the court which has not been made public but which affiant believes contains hearsay statements made with reference to the merits of this litigation. A copy of this report was made available to the United States Attorney but has not been made available to the affiant, or as far as he knows, to any other parties to this litigation. In its order herein of September 9, 1957, the court stated it had received a report from the United States attorney, and affiant is informed and believes that said report contains statements and other information, opinions and beliefs concerning the merits of this litigation, and that said report contains purported facts and conclusions indicating that the respondent, Orval E. Faubus, acted without just cause and in bad faith, and that, on the basis of said report, the judge of this court, Honorable Ronald N. Davies, has formed an opinion on the merits of this controversy and has prejudged the issues to be tried herein.

(6) On September 5, 1957, the Little Rock School Board by petition asked that court to temporarily suspend the enforcement of the integration plan in the Little Rock senior high schools. The ground set forth in the petition for temporary suspension was that tension existed surrounding the opening of Central High School, parents and others had formed into antagonistic

groups, and education was being generally disrupted. On Saturday, September 7, 1957, the Honorable Ronald N. Davies in denying the petition, stated:

> "The chief executive of Little Rock has stated that the Little Rock police have not had a single case of inter-racial violence reported to them and there has been no indication from sources available to him that there would be violence in regard to this situation."

The above statement was not properly a part of any order and was not based on evidence. At the time it was made, affiant had not been made a respondent herein. The Mayor of Little Rock was not a witness, he was not under oath, and no testimony was taken from him concerning the matters which Judge Davies stated to be facts, and therefore affiant verily believes that judge has prejudged the issues herein.

[*Intervention Ordered*]

(7) The court, without any request by any party litigant, on September 9, 1957, ordered the Department of Justice to intervene in this action and, further, to make the affiant a respondent. By his order Judge Davies further ordered the Attorney General of the United States as amicus curiae to file immediately a petition against Orval E. Faubus for an injunction to prevent the 'existing interferences' with the court's orders. Again on September 10 Judge Davies ordered that affiant be made a party to prevent continued obstruction of, and in interference with the court's order. Said orders were issued by Judge Davies, apparently based on information and purported facts given him by persons not parties to the litigation and affiant verily believes that by such action Judge Davies has departed from the role of impartial arbiter of judicial questions presented to him and has, in fact, assumed the role of an advocate favoring adverse parties to this affiant.

For the reasons stated herein, the respondent, Orval E. Faubus, verily believes that the Honorable Ronald N. Davies, has a personal bias favorable to the plaintiffs, John Aaron, et al., and the United States of America, amicus curiae, and a personal prejudice against this respondent, and would, therefore, be unable to conduct a fair and impartial trial and render a decision either of law or fact that would be free from prejudice.

Therefore, your affiant respectfully prays that the Honorable Ronald N. Davies shall proceed no further in the hearing of said cause, but that another judge be assigned thereto.

U. S. Motion

MOTION OF THE UNITED STATES, AS AMICUS CURIAE, TO STRIKE THE AFFIDAVIT OF PREJUDICE FILED ON BEHALF OF DEFENDANT, ORVAL E. FAUBUS, GOVERNOR OF THE STATE OF ARKANSAS

The United States, as amicus curiae, moves the Court to strike the affidavit of Governor Orval E. Faubus to disqualify District Judge Ronald N. Davies (sitting by assignment, pursuant to 28 U.S.C. 291, of Archibald K. Gardner, Chief Judge of the Court of Appeals for the Eighth Circuit) in the above-entitled proceeding on the following grounds:

1. The affidavit fails to state any fact showing personal bias or prejudice of said Judge against the affiant and, accordingly, is not legally sufficient under 28 U.S.C., Section 144.

2. The averments relating to press reports constitute unsupported hearsay, repetition of rumor or gossip, and are not evidentiary statements of matters known to the affiant.

3. The averment that Judge Davies has formed an opinion on the merits of the controversy and has prejudged the issues is insufficient as an unsupported legal conclusion not sustained by any averments of fact known to the affiant.

4. The affidavit was not timely filed. Its averments relate to matters stated to have occurred between September 3, 1957 and September 9, 1957. The affidavit was not filed until the morning of September 19, 1957, the day before the hearing and several days after the United States had subpoenaed numerous witnesses to testify at the hearing. In view of the absence of a showing of any adequate reason for such delay, the affidavit must be regarded as solely directed to accomplish delay and embarrassment to the administration of justice.

UNITED STATES OF AMERICA, Amicus Curiae
By Herbert Brownell, Jr.
Attorney General

By /s/ James W. Gallman
Asst. U. S. Attorney
Osro Cobb, U. S. Attorney
By James W. Gallman
Asst. U. S. Attorney

Points and Authorities

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF THE UNITED STATES, AS AMICUS CURIAE, TO STRIKE THE AFFIDAVIT OF PREJUDICE FILED ON BEHALF OF DEFENDANT, ORVAL E. FAUBUS, GOVERNOR OF THE STATE OF ARKANSAS

I

28 U. S. C. 144 provides:

> Whenever a party to any proceeding in a district court makes and files a *timely and sufficient affidavit* that the judge before whom the matter is pending has a *personal bias or prejudice* either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings.
> The affidavit *shall state the facts and the reasons for the belief* that bias or prejudice exists, and *shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard*, or *good cause shall be shown for failure to file it within such time.* A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. (Underscoring [italics] supplied.)

Under the statute, neither the parties nor the court are permitted to give any consideration to the truth or falsity of the facts charged: They must be assumed to be as stated. Scott v. Beams, 122 F.2d 777, 788 (C.A. 10). Accordingly, we are precluded from commenting upon the truth or falsity of the allegations of the affidavit.

The affidavit should be stricken as not timely filed. The acts alleged in the affidavit as grounds for disqualification are all stated to have occurred between September 3 and September 9, 1957. No valid excuse is offered for not having filed this affidavit prior to September 19, 1957. This is sufficient ground for striking the affidavit.

In Bishop v. U.S., 16 F.2d 410 (C.A. 8), where the affidavit of bias and prejudice was filed at the day of trial, the court said:

> It is the intent of the statute that the affidavit must be filed in time to protect the government from useless costs, and protect the court in the disarrangement of its calendar, and prevent useless delay of trials, and parties filing such affidavits should be held to strict diligence in presenting the claims of disqualification. There is no reason why this affidavit could not have been filed previous to the morning of trial, and at a time when the facts upon which it was to be based were fully known to defendants' counsel. Of course, if the facts were not known until the day of trial, it would then be in time; but where it clearly appears that practically all of them were known long prior thereto, and within ample time to have filed the affidavit before the day of trial, a party, by waiting until the day of the trial, evidences that the purpose of filing the same is delay. The spirit of the statute is thereby violated, and parties should not be permitted to reap therefrom the advantage of delay in trial. A new means of securing continuances would result from a holding that such affidavits of prejudice, where the facts are known long before, may be held until the last moment before trial and then filed.

Also in Bommarito v. U. S., 61 F.2d 355 (C.A. 8), the court said that a party

> could not wait four days and until the case was called for trial, and then insist upon the judge disqualifying himself and delaying the trial until some other judge was available. The court was entirely justified in overruling the application for that reason alone.

See also Hibdon v. U. S., 213 F.2d 869 (C.A. 6); Eisler v. U.S., 170 F.2d 273 (C.A. D.C.); Laughlin v. U.S., 151 F.2d 281 (C.A. D.C.); Bowles v. U.S., 50 F.2d 848 (C.A. 4).

II

The affidavit is not legally sufficient to justify disqualification of Judge Davies under the statute. This court must pass on the legal sufficiency of the affidavit. Barger v. U.S., 255 U.S. 22, 36.

The alleged acts of bias fall into four groups: (1) Discussions with the United States Attorney and other representatives of the Department of Justice (Charges 1, 2, 3, 4); (2) Receiving through the United States Attorney an investigation report by the Federal Bureau of Investigation (Charge 5); and (3) Referring to and extra-judicial statement by the Mayor of Little Rock; and (4) Requesting the Government to appear as amicus and file a petition against Governor Faubus.

[Allegations Insufficient]

Allegations in an affidavit of bias and prejudice that a Judge conferred about the case with the United States Attorney or other representatives of the Department of Justice have been expressly held insufficient to call for disqualification. Scott v. Beams, 122 F.2d 777, 788 (C.A. 10); Craven v. U.S. 22 F.2d 605 (C.A. 1). In the Craven case, supra, an allegation of this sort was called "frivolous", and the court said:

> We are surprised that experienced counsel should have certified an affidavit containing such a charge.

And in U.S. v. Onan, 190 F.2d 1 (C.A. 8), an affidavit alleging that the judge had discussed the case with the attorney for one side without the presence of opposing counsel was held insufficent. See also U.S. v. Gilbert, 29 F.Supp. 507 (S.D. Ohio).

The statement in the affidavit that Judge Davies, in ruling on the application of the defendant school board for a stay of his Order of September 3, 1957, referred to an extra-judicial statement by the Mayor of Little Rock, as merely an allegation that the judge failed to apply the rules of evidence correctly. Whether that charge be correct or incorrect as a matter of law, it is insufficient to justify disqualification. Disagreement with a judge's rulings on questions of law is no basis for disqualification. Ex parte American Steel Barrel Co., 230 U.S. 35; Berger v. U.S., 255 U.S. 22.

The remaining allegations of the affidavit are that Judge Davies received from the United States Attorney a report made by the Federal Bureau of Investigation and requested the Attorney General and the United States to appear in the case as amicus curiae and to file a petition against Governor Faubus and others.

By letter dated September 4, 1957, Judge Davies advised the United States Attorney as follows:

> I am advised this morning that this Court's order directing the integration of the Little Rock schools under a plan submitted by the Little Rock School Board, which plan has been approved by a Judge of this court and by the United States Court of Appeals for the Eighth Circuit, has not been complied with due to alleged interference with the Court's order.
>
> You are requested to begin at once a full, thorough and complete investigation to determine the responsibility for interference with said order, or responsibility for failure of compliance with said order of this Court heretofore made and filed, and to report your findings to me with the least practicable delay.

[Requests Proper]

These requests to the Attorney General and to the United States were a proper exercise of a federal court's authority to call on law officers of the United States to serve as amici curiae. Universal Oil Co. v. Root Mfg. Co., 328 U.S. 575, 581 (where amici curiae participated in hearings before a Master in Chancery). In S.E.C. v. United States Realty Co., 310 U.S. 434, the Securities and Exchange Commission was held entitled to intervene in a bankruptcy proceeding on a question of interpretation of a federal statute. In the following cases, the United States has appeared as amicus curiae: Brown v. Board of Education, 347 U.S. 483, 485; 349 U.S. 294, 297 (the public school segregation cases); California v. Taylor, 353 U.S. 553, 554; Radovich v. National Football League, 352 U.S. 445, 446; Pennsylvania Railroad Co. v. Rychlik, 352 U.S. 480, 481; Leslie Miller, Inc. v. Arkansas, 352 U.S. 187; Brewer v. Hoxie School District, 238 F.2d 91 (C.A. 8) (school segregation case).

Accordingly, these allegations afford no basis for disqualifications.

Respectfully submitted,
UNITED STATES OF
AMERICA, Amicus Curiae

By Herbert Brownell, Jr.
Attorney General

By /s/ Osro Cobb
United States Attorney

Order

DAVIES, District Judge.

This cause having been heard on the Motion of the United States, as Amicus Curiae, to Strike the Affidavit of Prejudice Filed on Behalf of Defendant, Orval E. Faubus, Governor of the State of Arkansas, and it appearing that said affidavit was not timely filed and was not legally sufficient as required by 28 U. S. C. 291; now therefore,

IT IS HEREBY ORDERED that the Motion of the United States, as Amicus Curiae, to Strike the Affidavit of Prejudice Filed on Behalf of Defendant, Orval E. Faubus, Governor of the State of Arkansas be, and it hereby is, granted and that said affidavit be and it hereby is stricken.

Dated September 21st, 1957.

• • •

On September 20, 1957, the governor filed a motion to dismiss the petition filed by the United States on the ground that its consideration required the convening of a three-judge federal district court. The motion was denied.

Motion to Dismiss

Respondents move the court to dismiss the petition of the United States of America, and for ground of said motion state:

The petition seeks a temporary and permanent injunction restraining the enforcement of a statute of this state by restraining the respondents, who are officers of the state, in the enforcement of said statute upon the ground of the unconstitutionality of such statute without the convening of a court of three judges, as provided in Sec. 2284, Title 28 USCA.

/s/ Thomas Harper
/s/ Kay Matthews
/s/ Walter L. Pope
Attorneys for
Respondents

Order

DAVIES, District Judge.

This cause having been heard on the Motion of Respondents Orval E. Faubus, Governor of the State of Arkansas, General Sherman T. Clinger, Adjutant General of the State of Arkansas, and Lt. Col. Marion E. Johnson, Unit Commander of the Arkansas National Guard, to dismiss the petition of the United States of America, as amicus curiae, filed herein, for failure to convene a three-judge court, and it appearing that said petition of the United States as amicus curiae does not seek an injunction restraining the enforcement of any statute of the State of Arkansas upon the ground of its unconstitutionality within the meaning of Title 28, U. S. C. 2284; now therefore,

IT IS HEREBY ORDERED that the Motion of Respondents Orval E. Faubus, Governor of the State of Arkansas, General Sherman T. Clinger, Adjutant General of the State of Arkansas, and Lt. Col. Marion E. Johnson, Unit Commander of the Arkansas National Guard, to dismiss the petition of the United States of America as amicus curiae, filed herein, for failure to convene a three-judge court be, and it hereby is, denied.

Dated September 21st, 1957.

Injunction Against Governor

On September 20, 1957, a hearing was held on the petition to restrain the governor and other state officials of Arkansas from interfering with the order of the court regarding the integration of the high school in Little Rock. Following the hearing the court found that

the state officials had acted in an unlawful manner to obstruct the carrying out of the court's order. An injunction was issued restraining the state officials from obstructing or preventing the attendance of Negro pupils at the high school by use of the National Guard or other means, or from coercing or threatening the Negro students, or from obstructing or interfering with the carrying out of the court's order.

DAVIES, District Judge.

[STATEMENT IN OPEN COURT, SEPTEMBER 20, 1957.]

The court: It is very clear to this court from the evidence and the testimony adduced upon the hearing today that the plan of integration adopted by the Little Rock school board and approved by this court and the court of appeals from the Eighth circuit has been thwarted by the governor of Arkansas by the use of national guard troops. It is equally demonstrable from the testimony here today that there would have been no violence in carrying out the plan of integration, and that there has been no violence.

The petition of the United States of America as amicus curiae for a preliminary injunction against Gov. Faubus, General Clinger and Colonel Johnson and all others named in the petition is granted; and such injunction shall issue without delay enjoining those respondents from obstructing or preventing by use of the national guard or otherwise attendance of Negro students at Little Rock high school under the plan of integration approved by this court and from otherwise obstructing or interfering with orders of this court in connection with the plan of integration.

Findings of fact, conclusions of law and orders and related instruments will be prepared by the attorneys for the United States.

Stand in recess.

Opinion

[SEPTEMBER 21, 1957.]

This cause having been heard upon the separate applications of plaintiffs and of the United States, as amicus curiae, for a preliminary injunction against defendants Orval E. Faubus, Governor of the State of Arkansas, Maj. General Sherman T. Clinger, adjutant general of the State of Arkansas, and Lieut. Col. Marion E. Johnson, unit commander of the Arkansas National Guard, the court makes the following findings of fact and conclusion of law:

FINDINGS OF FACTS

1. This action was brought by minor citizens and residents of the City of Little Rock, Ark., through their legal representatives, against the initial defendants, the Little Rock School District, its board of directors, and its superintendent as a class action seeking integration of public schools in the Little Rock School District.

2. On May 20, 1954 (three days after the Supreme Court's first decision in the Public School Segregation Cases, Brown v. Board of Education, 347 U. S. 483) the Little Rock school board released a public statement to the effect that it was the board's responsibility to comply with Federal constitutional requirements and they intended to do so when the Supreme Court of the United States outlined the method to be followed; and that during this interim period the Board would develop school attendance areas consistent with the location of white and colored pupils with respect to present and future facilities in the school district, would make the necessary provisions in pupil records in order that transition to an integrated school system might serve the best interests of the school district; and would make research studies needed for the implementation of a sound school program on an integrated basis.

[*Plan of Integration*]

3. The school board instructed superintendent, defendant Virgil Blossom, to prepare a plan for the integration of the schools in the school district. Such a plan was prepared and approved by the board on May 24, 1955. This plan is set forth verbatim in this court's opinion entered in this case on August 27, 1956 (Aaron et al. v. Cooper et al., 143 F.Supp. 855, 859), and the statement of the plan there set forth is incorporated herein by reference. Briefly, the plan provided for a three-phase program of integration. Phase 1 begins at the senior high school level (grades 10-12) and is scheduled to start in the fall of 1957 upon the completion of a new senior high school building. Phase 2 begins at the junior high school level (grades 7-9) and would

start following successful integration at the senior high school level (estimated at two to three years). Phase 3 begins at the elementary level (grades 1-6) and would start after successful completion of phases 1 and 2, complete integration is planned to be effected not later than 1963.

4. Subsequent to adoption of the plan, defendant Blossom read and explained it to approximately 200 groups in an effort to obtain public acceptance of its provisions and the resulting orderly integration of the schools. By its plan the school board is seeking to integrate its schools and at the same time maintain and improve the quality of education available at these schools. Its objectives are to provide the best possible education that is economically feasible, to consider each child in the light of his individual ability and achievement, to provide necessary flexibility in the school curriculum from one attendance area to another, to select, procure, and train an adequate school staff, to provide the opportunity for children to attend school in the attendance area where they reside, to attempt to provide information necessary for public understanding, acceptance, and support, and to provide a "teachable" group of children for each teacher.

[Four High Schools]

5. At the present time, there are four senior high schools in the school district. Central High School has been an all-white high school and accommodates approximately 2,000 students. Technical High School has been an all-white school and will accommodate approximately 250 students. Horace Mann High School has been an all-Negro school and will accommodate 925 students. Construction of the Hall High School, which accommodates 925 students, has recently been completed and it is in operation this current term.

6. In accordance with its plan, the school board has reorganized its attendance areas. Under the plan Technical High School will remain a city-wide school for all students, but Central, Horace Mann and Hall High School will each have separate attendance areas. There are two Negro students at the senior high school level residing in the Hall High School attendance area, and there are numbers of Negro and white students residing in the Central and Horace Mann High School attendance areas.

7. In preparing for integration, the school authorities have established attendance areas, studied the aptitudes of the children, started an in-service program for staff members, a program of information to members of the community, and other appropriate steps.

8. As stated in the plan, the school board is prepared to start integration in the fall of 1957 at the high school level. Its reason for starting at that level is that fewer students, teachers, buildings, etc., will be involved and the school authorities hope to be able to learn by experience and to be better able to enter the next phase of the plan.

[Board in Good Faith]

9. The defendant school authorities have worked diligently in a good faith effort to prepare and to effectuate a plan of integration that will be to the best interest of all parties and to the public. Superintendent Blossom is a highly qualified and experienced school administrator and has given much thought and study to the many problems relating to integration. He has had the cooperation of the school board in his efforts to achieve integration without lowering the quality of education offered to all the school children.

10. On August 28, 1956, this court, after a full trial, entered its decree and judgment approving the plan of school integration adopted by the school district on May 24, 1955, and ordering that jurisdiction of this case be retained for the purpose of entering such other and further orders as might be necessary to obtain the effectuation of the plan. On April 26, 1957, that decree and judgment were affirmed by the United States Court of Appeals for the Eighth Circuit (243 F.2d 361).

[Peaceful Interracial Relations]

11. The City of Little Rock has a long history of peaceful and amicable relations between the white and Negro races. Approximately 20 per cent of the population is colored. The Negroes reside in scattered sections of the city, and some neighborhoods are composed of both white and colored residents. For at least twenty-five years there has been no reported incident of violence arising from racial tension, either between adults or between children of school age. In January 1956, the city public transportation system

abolished the previously existing arrangement of seating whites and Negroes in separate sections of the buses. No incident of violence as a result of this change has come to the attention of the city authorities.

[*Preferences Studied*]

12. In preparation for the carrying out of the school plan at the senior high school level at the opening of the fall term, 1957, the superintendent and the principals of the senior high schools arranged for colored students who reside in the Central High School attendance area to elect whether or not they desired to attend that school. Approximately forty to fifty such students elected to attend that school. Their records were carefully studied by the school authorities. They approved the applications of thirteen of these colored students on the basis of their scholastic ability, their general deportment, their character and their health, determining that these thirteen students were particularly well suited to make the adjustment involved in their attending a school theretofore composed solely of white children. The superintendent and the high school principals held several meetings with these students and their parents to prepare them for the adjustments necessary to their attending Central High School.

All steps necessary to the transfer of these students and their enrollment in Central High School were completed before the opening of the fall term, 1957. Four of these thirteen colored students chose not to transfer to Central High School. Consequently, the carrying out of the school plan for this term involved the placing of only nine colored students in a student body of approximately 2,000. The faculty and the white student body at Central High School were prepared to accept the 9 colored children as fellow students.

[*National Guard Called Out*]

13. On the evening of September 2, 1957, the Governor of Arkansas and the Adjutant General of Arkansas, who is the commanding officer of the Arkansas National Guard (acting under orders issued to him by the Governor), stationed units of the Arkansas National Guard at the Little Rock Central High School. Those guardsmen were under the command of Lieut. Col. Marion E. Johnson. On September 2, 1957, the Governor of Arkansas issued to the Adjutant General an order directing him to place off-limits to white students those schools for colored students and to place off-limits to colored students those schools theretofore operated and recently set up for white students; and that this order was to remain in effect until the demobilization of the guard or until further orders. This order was in effect at the time of the hearing in this case on September 20, 1957.

[*No Prior Violence*]

14. Up to this time, no crowds had gathered about Central High School and no acts of violence or threats of violence in connection with the carrying out of the plan had occurred. Never the less, out of an abundance of caution, the school authorities had frequently conferred with the Mayor and Chief of Police of Little Rock about taking appropriate steps by the Little Rock Police to prevent any possible disturbances or acts of violence in connection with the attendance of the nine colored students at Central High School. The Mayor considered that the Little Rock Police Force could adequately cope with any incidents which might arise at the opening of school. The Mayor, the Chief of Police, and the school authorities made no request to the Governor or any representative of his for state assistance in maintaining peace and order at Central High School. Neither the Governor nor any other official of the State Government consulted with the Little Rock authorities about whether the Little Rock Police were prepared to cope with any incidents which might arise at the school, about any need for state assistance in maintaining peace and order, or about stationing the Arkansas National Guard at Central High School.

[*Negroes Refused Admission*]

15. The fall term at Central High School began on September 3, but none of the nine eligible colored students appeared at the school that day because they had been advised not to do so since the National Guard was stationed at the school. On the evening of September 3, however, these students were advised by school officials to attend Central High School the next morning.

16. On the morning of September 4, 1957, the units of the National Guard at the Central High School, acting pursuant to the Governor's order.

stood shoulder-to-shoulder at the school grounds and thereby forcibly prevented the nine Negro students, who were eligible under the School Board's plan to attend that school, from entering the school grounds. At that time, a crowd of spectators congregated across the street from the school grounds. No acts of violence were committed or threatened by the crowd, although some of them made rude and disparaging remarks about the colored students. The guardsmen made no effort to disperse the crowd or to assist and protect the colored students in their efforts to enter the school. They did not prevent any white students from entering the school. The evidence indicates that the Arkansas National Guard, which is composed of 10,500 men, could have maintained peace and order without preventing the eligible colored students from attending Central High School.

17. On September 3, 1957, the court, upon consideration of a petition for instruction filed in this cause on that date by the defendant school authorities, ordered that they integrate, in accordance with their plan approved by the court, the senior high school grades in the school district forthwith. On September 7, 1957, the court denied the application of the School District for a stay of the court's order of September 3.

[*Obstruction By State Officials*]

18. Since September 2, and up to the time of the hearing in this court on September 20, 1957, the units of the Arkansas National Guard have remained at Central High School and have continued to prevent eligible Negro students from attending the school, pursuant to the order issued to them by the Governor of Arkansas through the Adjutant General of Arkansas. The acts of Governor Faubus, General Clinger, and Lieutenant Colonel Johnson in preventing, by means of the Arkansas National Guard, eligible Negro students from attending Central High School directly obstruct and interfere with the carrying out and effectuation of this court's orders of August 28, 1956, and September 3, 1957, contrary to the due and proper administration of justice.

19. The minor plaintiffs and the other Negro students who are eligible under the school district's plan to attend Central High School have suffered immediate and irreparable injury from said acts of Governor Faubus, General Clinger, and Lieutenant Colonel Johnson, in that the colored students were forcibly deprived of their right to attend Central High School in accordance with the school board's plan, this court's orders of August 28, 1956, and September 3, 1957, and the Federal Constitution. The minor plaintiffs and other eligible Negro students on whose behalf this suit is brought have no adequate legal remedy and are entitled to a preliminary injunction against Governor Faubus, General Clinger and Lieutenant Colonel Johnson restraining them from obstructing or preventing, by means of the Arkansas National Guard or otherwise, eligible Negro students from attending Central High School, from threatening or coercing said students not to attend said school, from otherwise obstructing or interfering in any way with the carrying out and effectuation of this court's orders of August 28, 1956, and September 3, 1957, and from otherwise obstructing or interfering with the Constitutional right of said Negro students to attend said school.

20. Such injunction is necessary to order to protect and preserve the judicial process of the court, to maintain the due and proper administration of justice, and to protect the Constitutional rights of the minor plaintiffs and other eligible Negro students on whose behalf this suit is brought.

CONCLUSIONS OF LAW

1. This court has jurisdiction of the subject matter of this action and of the parties.

2. The Governor of Arkansas, as chief executive and commander in chief of its military forces, has a vital interest in the maintenance of law and order and broad discretionary powers to suppress insurrection and to preserve the peace. Article VI, Section 4, of the Constitution of the State expressly provides that:

> "The Governor shall be commander-in-chief of the military and naval forces of the state, and may call out such forces to execute the laws, suppress insurrections, repel invasions or preserve the public peace."

Section 5 provides that:

> "It shall be the duty of the Governor to see that the laws are faithfully executed."

As the chief executive of the state, he is appropriately vested with the discretion to de-

termine whether an exigency requiring military state aid for that purpose has arisen.

[*Use of Troups Illegal*]

3. The Governor does not, however, have lawful authority to use the National Guard to deprive the eligible colored students from exercising their right to attend Central High School, which right is guaranteed by the Federal Constitution, the school district plan of integration and the court's orders entered in this cause. If it be assumed that the Governor was entitled to bring military force to the aid of civil authority, the proper use of that power in this instance was to maintain the Federal Court in the exercise of its jurisdiction, to aid in making its process effective and not to nullify it, to remove, and not to create, obstructions to the exercise by the Negro children of their rights as judicially declared.

4. This action is not a suit against the State of Arkansas. It does not seek to invalidate any provision of Arkansas statute or of the Arkansas Constitution. It merely seeks to enjoin the Governor and other officials of the state from committing acts beyond their lawful authority and contrary to the Federal Constitution.

[*Acts of Governor Illegal*]

5. The acts of defendants Gov. Orval E. Faubus, Governor of the State of Arkansas, General Sherman T. Clinger, Adjutant General of Arkansas, and Lieut. Col. Marion E. Johnson, Unit Commander of the Arkansas National Guard, in forcibly preventing colored students, who are eligible under the school board's plan to attend Central High School, from doing so are beyond their lawful authority. Said acts unlawfully obstruct and interfere with the carrying out and effectuation of the court's orders of August 28, 1956, and September 3, 1957, contrary to the due and proper administration of justice; and they violate the Constitutional rights of said colored children.

6. An injunction against said Governor Faubus, General Clinger and Lieutenant Colonel Johnson is necessary in order to protect and preserve judicial process of the court, to maintain the due and proper administration of justice and to protect the constitutional rights of the minor plaintiffs and other eligible Negro students on whose behalf this suit is brought.

Dated this twenty-first day of September, 1957.

Injunction

This cause having been heard upon separate applications of the United States, as amicus curiae, and of the plaintiffs for a preliminary injunction, and it appearing that:

1. Certain Negro students have been accepted for admission to the Little Rock Central High School and are eligible to attend classes there in accordance with a plan for gradual school integration, adopted by the Little Rock School District on May 24, 1955, and applicable at the senior high school level upon the opening of the school term in the fall of 1957; this court, by decree and judgment of August 28, 1956, approved said plan of gradual school integration and its decree was affirmed by the United States Court of Appeals for the Eighth Circuit; and this court on September 3, 1957, ordered the members of the Little Rock School Board and the Superintendent of the Little Rock Public Schools to comply forthwith with the plan of school integration approved by this court's decree of August 28, 1956, as to senior high school classes in the Little Rock School District.

2. The foregoing orders of this court confirmed and enforced the constitutional right of the Negro children involved to attend the Little Rock Central High School.

3. On September 2, 1957, upon orders of defendant Orval E. Faubus, Governor of the State of Arkansas, and in conformity therewith defendant Gen. Sherman T. Clinger, Adjutant General of the State of Arkansas, and defendant Lieut. Col. Marion E. Johnson, of the Arkansas National Guard, stationed members of the Arkansas National Guard at the Little Rock Central High School and said defendant Governor Faubus ordered that the Arkansas National Guard prevent and restrain by force the Negro students, eligible to attend classes in said high school under the plan of school integration referred to above, from entering the school and attending classes, and since September 2, 1957, defendants Governor Faubus, General Clinger and Lieutenant Colonel Johnson have prevented said Negro students from attending such school by the armed force of the Arkansas National Guard.

4. The use of the Arkansas National Guard to deny access to the school by the Negro children upon the orders of the defendant Governor

Faubus obstructs and interferes with the carrying out and effectuation of this court's orders of August 28, 1956, and September 3, 1957, contrary to the due and proper administration of justice.

5. Although the use of the armed force of the State of Arkansas to deny access to the school of Negro children has been declared by Governor Faubus to be required to preserve peace and order, such use of the Arkansas National Guard was and is unlawful, and in violation of the rights of the Negro children under the Fourteenth Amendment as determined by this court.

6. An injunction is necessary in order to protect and preserve the judicial process of this court, to maintain the due and proper administration of justice and to protect the rights guaranteed by the Constitution to the Negro children involved, now, therefore:

[*Decree*]

It is hereby ordered and decreed that defendant Orval E. Faubus, Governor of the State of Arkansas, Gen. Sherman T. Clinger, Adjutant General of the State of Arkansas, and Lieut. Col. Marion E. Johnson of the Arkansas National Guard, their officers, agents, servants, employes, attorneys, all persons subject to their joint or several orders and directions, and all persons in active concert, participation or privity with them, be and they are hereby enjoined and restrained from hereafter (a) obstructing or preventing, by means of the Arkansas National Guard, or otherwise, Negro students, eligible under said plan of school integration to attend the Little Rock Central High School, from attending said school or (b) from threatening or coercing said students not to attend said school or (c) from obstructing or interfering in any way with the carrying out and effectuation of his court's orders of August 28, 1956, and September 3, 1957, in this cause, or (d) from otherwise obstructing or interfering with the constitutional right of said Negro children to attend said school.

Provided that this order shall not be deemed to prevent Orval E. Faubus, as Governor of the State of Arkansas, from taking any and all action he may deem necessary or desirable for the preservation of peace and order, by means of the Arkansas National Guard, or otherwise, which does not hinder or interfere with the right of eligible Negro students to attend the Little Rock Central High School.

September 20th, 1957.

President's Action

In response to the above injunction of the court not to use the National Guard to prevent the attendance of Negro pupils at the Little Rock, Arkansas, high school, the governor of Arkansas withdrew the National Guard troops entirely from the school. On September 23, 1957, disorders occurred at the school. On that date the President of the United States issued the following proclamation:

Proclamation 3204

[22 F. R. 7628]

OBSTRUCTION OF JUSTICE IN THE STATE OF ARKANSAS

By the President of The United States of America

A PROCLAMATION

WHEREAS certain persons in the State of Arkansas, individually and in unlawful assemblages, combinations, and conspiracies, have wilfully obstructed the enforcement of orders of the United States District Court for the Eastern District of Arkansas with respect to matters relating to enrollment and attendance at public schools, particularly at Central High School, located in Little Rock School District, Little Rock, Arkansas; and

WHEREAS such wilful obstruction of justice hinders the execution of the laws of that State and of the United States, and makes it impracti-

cable to enforce such laws by the ordinary course of judicial proceedings; and

WHEREAS such obstruction of justice constitutes a denial of the equal protection of the laws secured by the Constitution of the United States and impedes the course of justice under those laws:

NOW, THEREFORE, I, DWIGHT D. EISENHOWER, President of the United States, under and by virtue of the authority vested in me by the Constitution and statutes of the United States, including Chapter 15 of Title 10 of the United States Code, particularly sections 332, 333 and 334 thereof, do command all persons engaged in such obstruction of justice to cease and desist therefrom, and to disperse forthwith.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Newport, Rhode Island this twenty-third day of September in the year of our Lord Nineteen hundred and fifty-seven and of the Independence of the United States of America the one hundred and eighty-second.

DWIGHT D. EISENHOWER

By the President:
JOHN FOSTER DULLES,
Secretary of State.

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* * *

Following the issuance of the above proclamation, the President of the United States issued an executive order directing the use of armed forces of the United States to enforce the proclamation. After reciting the above proclamation, the executive order provides:

Executive Order 10730

[22 F. R. 7628]

Providing Assistance for the Removal of an Obstruction of Justice Within the State of Arkansas

WHEREAS on September 23, 1957, I issued Proclamation No. 3204 reading in part as follows:

"WHEREAS certain persons in the State of Arkansas, individually and in unlawful assemblages, combinations, and conspiracies, have willfully obstructed the enforcement of orders of the United States District Court for the Eastern District of Arkansas with respect to matters relating to enrollment and attendance at public schools, particularly at Central High School, located in Little Rock School District, Little Rock, Arkansas; and

"WHEREAS such wilful obstruction of justice hinders the execution of the laws of that State and of the United States, and makes it impracticable to enforce such laws by the ordinary course of judicial proceedings; and

"WHEREAS such obstruction of justice constitutes a denial of the equal protection of the laws secured by the Constitution of the United States and impedes the course of justice under those laws:

"NOW, THEREFORE, I, DWIGHT D. EISENHOWER, President of the United States, under and by virtue of the authority vested in me by the Constitution and Statutes of the United States, including Chapter 15 of Title 10 of the United States Code, particularly sections 332, 333 and 334 thereof, do command all persons engaged in such obstruction of justice to cease and desist therefrom, and to disperse forthwith;" and

WHEREAS the command contained in that Proclamation has not been obeyed and wilful obstruction of enforcement of said court orders still exists and threatens to continue:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and Statutes of the United States, including Chapter 15 of Title 10, particularly sections 332, 333 and 334 thereof, and section 301 of Title 3 of the United States Code, it is hereby ordered as follows:

SECTION 1. I hereby authorize and direct the Secretary of Defense to order into the active military service of the United States as he may deem appropriate to carry out the purposes of

this Order, any or all of the units of the National Guard of the United States and of the Air National Guard of the United States within the State of Arkansas to serve in the active military service of the United States for an indefinite period and until relieved by appropriate orders.

SEC. 2. The Secretary of Defense is authorized and directed to take all appropriate steps to enforce any orders of the United States District Court for the Eastern District of Arkansas for the removal of obstruction of justice in the State of Arkansas with respect to matters relating to enrollment and attendance at public schools in the Little Rock School District, Little Rock, Arkansas. In carrying out the provisions of this section, the Secretary of Defense is authorized to use the units, and members thereof, ordered into the active military service of the United States pursuant to Section 1 of this Order.

SEC. 3. In furtherance of the enforcement of the aforementioned orders of the United States District Court for the Eastern District of Arkansas, the Secretary of Defense is authorized to use such of the armed forces of the United States as he may deem necessary.

SEC. 4. The Secretary of Defense is authorized to delegate to the Secretary of the Army or the Secretary of the Air Force, or both, any of the authority conferred upon him by this Order.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,

September 24, 1957.

• • •

Pursuant to the above Executive Order, the Secretary of Defense issued the following order on September 24, 1957:

I, Charles E. Wilson, Secretary of Defense of the United States of America, by virtue of the direction to me from the President of the United States under executive order dated 24 September 1957, entitled "Providing Assistance for the removal of an Obstruction of Justice Within the State of Arkansas," hereby call into the Federal service all of the units and the members thereof of the Army National Guard and the Air National Guard of the state of Arkansas, to serve in the active military service of the United States for an indefinite period and until relieved by appropriate orders.

I order the members of such National Guard units to hold themselves in readiness for further orders as to the time and date of reporting to active duty by the Secretary of the Army acting for me.

Copies hereof shall be furnished forthwith to the Governor of Arkansas and to the commanding officers of the Army National Guard and the Air National Guard in the state of Arkansas.

I further direct that the Secretary of the Army take such action as he deems necessary to implement such executive order and this order, and I hereby vest in the Secretary of the Army the right to exercise any and all of the authority conferred upon me by sections 2 and 3 of the above mentioned executive order, as of 24 September, 1957.

EDUCATION
Public Schools—Arkansas

Thomas Leroy BANKS et al. v. J. J. IZZARD, as President, etc., Board of Trustees, Van Buren Independent School District, et al.

United States District Court, Western District, Arkansas, Civ. No. 1236.

SUMMARY: Negro school children in Van Buren, Arkansas, had brought suit in federal district court in that state seeking admission to public schools without regard to race or color. The defendants, officials of the Van Buren public schools, filed a motion for a continuance.

After hearing on that motion, the court filed an interlocutory order requiring the school officials to make a "prompt and reasonable start" toward desegregation of the schools and to report to the court the progress made. 1 Race Rel L. Rep. 299. On August 20, 1956, the school board made a report in which it set forth a plan of integration to commence with the high school and to integrate one additional grade a year in inverse order. 1 Race Rel. L. Rep. 860. On August 8, 1957, the school board filed a further progress report indicating that the start of integration would be made with the September, 1957, school term in the high school. The report follows:

PROGRESS REPORT
OF INTEGRATION

On January 18, 1956, the Court entered an order in this case ordering and directing that the defendants and their successors in office should make a prompt and reasonable start toward effectuating the transition to a racially non-discriminatory school system as required by the ruling of the Supreme Court of the United States by its order of May 17, 1954, and ordering and directing that the defendants and their successors in office report to the Court not later than August 15, 1956, the progress that had been made and the plans to effectuate such transition from the present system to a racially non-discriminatory school system. Thereafter on August 8, 1956, upon the request of the defendants, the court by its order granted an additional five days time in which to file the report of progress and plans as theretofore directed.

Pursuant to the order and direction of this court and on August 20, 1956, defendants filed a progress report and plan of integration in which there was outlined the problems attendant upon complying with the directions to effectuate such transition. The defendants, after due consideration and study of the problem, proposed as the most feasible method of complying with the court's order to accomplish integration, first enrolling children in the ninth, tenth, eleventh and twelfth grades on a racially non-discriminatory basis, and in the succeeding year commence the integration of the remainder of the grades, beginning with the eighth grade, and in inverse order integrating one grade each year, thus accomplishing full integration within a period of nine years from the inception of the plan. It was proposed in the plan that integration should commence after the completion of the new junior high school building which at that time was in process of construction.

The defendants, for their progress report of their compliance with the court's orders and directions, state that the junior high school building will be completed by the commencement of the September, 1957, school term and that pursuant to the court's directions and the plan of integration heretofore filed, said plan will be implemented at that time by enrollment of students in the ninth, tenth, eleventh and twelfth grades of the Defendant District on a racially non-discriminatory basis.

That heretofore the Defendant District has operated a bus for the transportation of its Negro students in these grades to the Lincoln High School in Fort Smith for instruction in that school under an arrangement between the special school district of Fort Smith and the Defendant District. This arrangement will be continued for the benefit of any of said students in said grades who should voluntarily choose to continue attendance at said Lincoln High School, such arrangement, however, being on a purely voluntary basis.

WHEREFORE, these defendants pray that this progress report be accepted.

J. J. IZZARD, et al., as Trustees of VAN BUREN INDEPENDENT SCHOOL DISTRICT, EVERETT KELLEY, SUPERINTENDENT, AND VAN BUREN INDEPENDENT SCHOOL DISTRICT

By J. J. Izzard,
President
Everett Kelley
Secretary

Ralph W. Robinson
Bruce H. Shaw,
Attorneys for Defendants

EDUCATION
Public Schools—North Carolina

IN RE: APPLICATIONS FOR REASSIGNMENT; Josephine Ophelia Boyd from Dudley High School to Senior High School; etc. (Notice of Appeal and Petitions)

Superior Court, Guilford County, North Carolina, September 4, 1957, Appeal Docket No. 3223, Trial Docket No. 1626.

SUMMARY: On July 23, 1957, the Greensboro, North Carolina, Board of Education had, pursuant to the North Carolina "Pupil Placement Act" (1 Race Rel. L. Rep. 240, 939), granted applications for reassignment to six Negro pupils to previously "white" schools. Thereafter three citizens of Guilford County filed in the superior court "on their own behalf and on the behalf of all other parents and taxpayers similarly situated" an action in the nature of an appeal from the action of the board in reassigning the Negro pupils. Later individual petitions for restraining orders were filed by the same parties seeking to prevent the reassignment of the pupils. After a hearing the court dismissed the appeal and denied the petitions. The court stated that the plaintiffs had no standing under the Pupil Placement Act to bring an appeal and that there was a misjoinder of parties because the act requires the application of each pupil to be acted on individually. (See *Joyner v. McDowell County Board of Education*, 92 S.E.2d 795, 1 Race Rel. L. Rep. 646 [N. C., 1956].) The court further held that there was no showing that the board had acted arbitrarily, in bad faith or beyond its authority in granting the reassignments.

PREYER, J.

THIS MATTER COMING ON FOR HEARING at 10:00 A. M. on 29 August 1957 before His Honor L. Richardson Preyer, Resident Judge of the Eighteenth Judicial District, at the Courthouse in Greensboro, North Carolina, the appellants and petitioners herein being represented at the hearing by J. J. Shields, Esquire, and The Greensboro City Board of Education being represented by Robert F. Moseley, Esquire, and Welch Jordan, Esquire, and it appearing to the Court that in this matter there have been proceedings as follows:

(1.) On 23 July 1957, at a public meeting of The Greensboro City Board of Education, the Board voted to grant the applications for reassignment which had been previously filed with the Board by the parent or parents of six pupils of the public schools in the Greensboro school district, as follows:

Josephine Ophelia Boyd from Dudley High School to Senior High School
Harold McDuffie Davis from Lincoln Junior High School to Gillespie Junior High School
Elijah H. Herring, Jr., from Lincoln Junior High School to Gillespie Junior High School
Russell Herring from Lincoln Junior High School to Gillespie Junior High School
Brenda K. Florence from Bluford School to Gillespie Elementary School
Jimmie B. Florence from Bluford School to Gillespie Elementary School;

(2.) That thereafter, on 2 August 1957, J. E. Turner, Jr., James A. Strunks and James W. Cudworth, acting through their attorney, and "on their own behalf and on the behalf of all other parents and taxpayers similarly situated" filed in the Superior Court of Guilford County a document captioned in the manner shown in the first paragraph of the caption of this judgment and entitled "Appeal Entry" in which said persons stated that appeal was taken from the order or orders of The Greensboro City Board of Education entered on 23 July 1957 reassigning said children, the appeal being taken under the provisions of Section 115-179 of the General Statutes of North Carolina;

(3.) That a notice of said appeal was served by the Sheriff of Guilford County upon the Secretary of The Greensboro City Board of Education on 2 August 1957, together with a copy of said "Appeal Entry", and, thereafter, said notice was received by the Clerk of the Superior Court of Guilford County from the Sheriff of Guilford County on 6 August 1957;

(4.) That on 22 August 1957 six separate verified petitions for restraining orders, captioned,

respectively, as shown in the last six paragraphs of the caption hereof, were filed with the Clerk of the Superior Court of Guilford County, in each of which petitions it was prayed that the order of reassignment made by The Greensboro City Board of Education on 23 July 1957 referred to in each petition be set aside and each pupil ordered enrolled in the public school to which he or she was originally assigned, that a temporary restraining order issue enjoining The Greensboro City Board of Education from reassigning each of said pupils, and that The Greensboro City Board of Education be permanently restrained from reassigning or enrolling each of said pupils in the schools to which they had been reassigned by the orders of 23 July 1957;

(5.) That upon each of said petitions the undersigned Resident Judge of the Eighteenth Judicial District on 22 August 1957 issued an order directing The Greensboro City Board of Education to appear at the Courthouse in Greensboro, North Carolina, at 10:00 A. M. on 29 August 1957 and show cause, if any there be, why the injunction prayed by the petition should not be granted until the final determination of this action, and directing that a copy of each order and each petition be served upon The Greensboro City Board of Education;

(6.) That on 22 August 1957 each of said six orders was duly served by the Sheriff of Guilford County upon the Secretary of The Greensboro City Board of Education by leaving with him a copy of each and a copy of each petition;

(7.) That on 27 August 1957 The Greensboro City Board of Education, through its attorneys, filed with the Clerk of the Superior Court the original and a copy of a motion to dismiss the appeal of J. E. Turner, Jr., James A. Strunks and James W. Cudworth upon the grounds assigned in the written motion; and

(8.) That on 28 August 1957 The Greensboro City Board of Education, through its attorneys, filed with the Clerk of the Superior Court of Guilford County an answer to each of said six petitions, all of said answers being duly verified by the Chairman of The Greensboro City Board of Education.

[*Pleadings Made*]

At the opening of the hearing of this matter, the attorney for the appellants and petitioners and the attorneys for The Greensboro City Board of Education announced that they were ready to proceed; and the attorney for the appellants and petitioners moved that the Court not now consider the motion to dismiss the appeal which had been filed by the attorneys for The Greensboro City Board of Education on 27 August 1957, which motion was overruled by the Court, and the attorneys for The Greensboro City Board of Education demurred *ore tenus* to the entire proceeding upon the grounds that the Court has no jurisdiction of the appeal for the same reasons and upon the same grounds assigned in the motion to dismiss the appeal and also demurred *ore tenus* to each of the petitions upon the grounds that each and all of them failed to state facts upon which any of the relief sought by the petitioners could be granted. By consent of the attorneys for the petitioners and The Greensboro City Board of Education all six of the petitions and the answers thereto were consolidated for the purpose of this hearing.

The Court examined and considered the appeal entry, notice of appeal, the six petitions and the answers thereto, which petitions and answers were received and treated by the Court as affidavits of the parties for the purposes of hearing and determining the matters before the Court, and the Court heard and considered the arguments of the attorney for the petitioners and the attorneys for The Greensboro City Board of Education upon the petitions for restraining orders *pendente lite*, the motion of The Greensboro City Board of Education to dismiss the appeal of J. E. Turner, Jr., James A. Strunks and James W. Cudworth, and the demurrers *ore tenus* of The Greensboro City Board of Education to the entire proceeding and to each and all of the petitions.

At the conclusion of the Court's consideration of the documents hereinabove referred to and the arguments of counsel for the parties, the Court is of the opinion and finds that the petitioners are not entitled to the entry of the restraining orders *pendente lite* as prayed in the six petitions for the following reasons:

1. There is no showing that the Pupil Enrollment Act (G. S. 115-176 through G. S. 115-179, as amended) is unconstitutional, and Chief Judge John J. Parker of the Court of Appeals for the Fourth Circuit, in the Court's opinion in Carson v. Warlick, 238 F. 2d 724, said that the Act is not unconstitu-

tional upon its face. There is no allegation and no showing that The Greensboro City Board of Education exceeded the authority conferred upon it by the Act, or that it abused its authority, or that it acted arbitrarily or in bad faith, just as there is no showing, or any attempt to show, that the petitioners have acted in any way but in good faith. The legislative purpose and intent of the Pupil Enrollment Act was, as the Act says, to give county and city boards of education full and complete authority in the matter of assignment of children to the public schools. The Greensboro City Board of Education acted after long and careful consideration and with the intent and purpose of acting in such manner as to uphold the constitutionality of the Pupil Enrollment Act, and it acted in full compliance with all of the applicable provisions of the Act. There is, therefore, no probable cause for supposing that the petitioners would be able to maintain their primary equity.

2. The only persons who may appeal to the Superior Court under the Pupil Enrollment Act are persons whose application for assignment to a particular school has been denied by the Board of Education. No legal rights of any of the petitioners or appellants have been injuriously affected by the action of the Board of Education in making the reassignments of the pupils complained of, and none of the petitioners or appellants is a "person aggrieved" within the meaning of that term as used in the Pupil Enrollment Act.

3. As Chief Judge Parker said in the Carson v. Warlick case, and as the North Carolina Supreme Court said in Joyner v. McDowell County Board of Education, 244 N. C. 164, the rights given by the Pupil Enrollment Act and the rights to be enforced by the courts under that Act are the rights of individuals and not those of a class or group. The appeal of the appellants is a class appeal constituting a class action, and there is a misjoinder of both parties and causes of action.

Upon consideration of the notice of appeal and the appeal entry, the motion of The Greensboro City Board of Education to dismiss the appeal, and the demurrers *ore tenus* lodged by the attorneys for The Greensboro City Board of Education, and after consideration of the arguments of counsel upon said matters, the Court is of the opinion and finds that the motion to dismiss the appeal should be granted and the demurrers *ore tenus* should be sustained for the following reasons:

1. None of the petitioners is a "person aggrieved" within the meaning of the Pupil Enrollment Act.

2. This is a class appeal, constituting this a class action, which is not permitted by the Pupil Enrollment Act.

3. There is a misjoinder of both parties and causes of action.

The Court is also of the opinion and finds in its discretion that the motion of the petitioners for restraining orders so that the admission of the pupils to the schools indicated in the caption hereof may be stayed pending an appeal from this judgment to the Supreme Court of North Carolina should be denied. It is now, therefore, ORDERED, ADJUDGED, AND DECREED:

FIRST. That each of the petitions for a restraining order as shown in the caption hereof is denied;

SECOND. That the appeal of J. E. Turner, Jr., James A. Strunks and James W. Cudworth from The Greensboro City Board of Education to the Superior Court, which appears first in the caption hereof, is dismissed;

THIRD. That the motion of the petitioners for a restraining order pending appeal to the Supreme Court is denied in the discretion of the Court; and

FOURTH. That the appellants and the petitioners shall pay the costs in this matter, the same to be taxed by the Clerk.

The Court having announced from the Bench at the conclusion of the hearing on 29 August 1957 the foregoing decisions and rulings, this judgment is entered this 4 day of September, 1957, as of 29 August 1957.

EDUCATION
Public Schools—Tennessee

Robert W. KELLEY et al. v. BOARD OF EDUCATION OF THE CITY OF NASHVILLE, Davidson County, Tennessee, et al.

United States District Court, Middle District, Tennessee, September 6, 1957, Civ. No. 2094.

SUMMARY: White and Negro patrons of public schools in Nashville, Tennessee, filed an action in federal district court seeking to require the City Board of Education to admit children to public schools in the city without regard to race or color. A motion to constitute a three-judge court was granted. The court determined that it did not have jurisdiction, the invalidity of Tennessee constitutional and statutory provisions requiring racially separate schools being conceded by the defendants, and remanded the case to a single judge court. The court further found that the board of education was proceeding in good faith toward eliminating segregation in the schools and granted a continuance to the next term of court. 139 F.Supp. 578, 1 Race Rel. L. Rep. 519 (1956). Later a motion to intervene in the case by members of the Tennessee Federation for Constitutional Government was denied by the court. 1 Race Rel. L. Rep. 1042 (1956). On October 29, 1956, the Board of Education adopted a plan providing for the elimination of compulsory segregation in the first grade beginning with the 1957-58 school year with a limited right of transfer on the basis of the racial composition of the school attended and setting a date for further consideration of the time and extent of additional integration. 1 Race Rel. L. Rep. 1120. This plan was submitted to the court on further hearing of the action for an injunction. The court approved the plan in part as being a prompt and reasonable start toward complete integration but directed the board to submit, before December 31, 1957, "a report setting forth a complete plan to abolish segregation in all of the remaining grades of the city school system, including a time schedule therefor." 2 Race Rel. L. Rep. 21 (1957). Just prior to the commencement of the 1957 school term the board, because of a petition filed with it by several citizens, moved to file a supplemental answer in order to ascertain its authority under and the validity of recent Tennessee legislation. The legislation (Chapter 11, Tennessee Public Acts, 1957, 2 Race Rel. L. Rep. 215) authorizes boards of education to provide separate schools for white and Negro children whose parents or guardians elect that they attend such schools. After hearing the court denied the motion. The court held that the act in question is, on its face, antagonistic to the constitutional principles announced in the *School Segregation Cases* and therefore unconstitutional.

THE COURT'S STATEMENT DELIVERED FROM THE BENCH, September 6, 1957.

MILLER, District Judge.

As the Court intimated a moment ago, it feels strongly that the question which has been presented here should be passed upon with all possible dispatch since the school year is about to begin and since the school board is under an order from this Court to carry out a plan of integration in compliance with the decisions of the Supreme Court of the United States. The timing of the plan is an essential part of it.

The question presented by the motion to file the supplemental answer and counterclaim is not new to the Court, as it has been considered by the Court since the motion was filed a week ago. Knowing that this hearing was to arise, the Court asked for the file in the case, and read the proposed supplemental answer and counterclaim, and immediately began an investigation of the legal questions involved, taking that course because of the public interest in the matter and because of the importance of the time element. I feel that I am as ready to pass upon the questions presented today as I will ever be.

[*Arguments Presented*]

I have been greatly assisted by the able arguments which have been made here on behalf of the various parties, the movants who seek to file this supplemental answer, the attorneys for

the original plaintiffs, the attorneys for the School Preference Committee, and the attorneys for the State of Tennessee. The arguments have been sincerely and capably made and presented, and have brought to the attention of the Court the issues in a forcible and thorough manner.

The pleading in this case, as already stated, is a motion by which the School Board of Nashville, being the defendants in the action, asks the permission of the Court to file a supplemental answer and counterclaim which, in turn, would ask the Court to declare the rights of the school board under a certain act of the 1957 Legislature of Tennessee, being Chapter 11 of the Public Acts of 1957, known as the School Preference Law.

The supplemental answer and counterclaim would call upon the Court to determine in effect and substance (a) the validity of the statute, (b) whether or not it is in conflict with the opinions of the Supreme Court of the United States, (c) whether or not it is in conflict with the orders of the Court heretofore entered in this cause, and (d) just what rights and privileges the school board possesses under the statute. In other words, the pleading is in the nature of a request for a declaratory judgment, declaring the rights of the parties, as indeed is the nature of the entire suit itself, the original complaint having been filed in this action as a declaratory judgment action.

[*History of Litigation*]

A brief word ought to be said, it seems to me, about the history of this litigation. The action was filed, as already pointed out, by certain parents of colored children and later by parents of certain white children of the City of Nashville, to have their rights declared under the decisions of the Supreme Court of the United States enunciating the doctrine that racial segregation in public education is unconstitutional and disapproving the "separate but equal" doctrine of Plessy v. Ferguson which was decided, I believe, in 1896 or thereabouts.

The school board filed an answer to the complaint in which it in effect, if not in so many words, conceded the unconstitutionality of the segregation laws of the State of Tennessee.

The matter first came before a three-judge court, convened in view of the nature of the relief sought by the original complaint. At that time the defendants made a motion for a continuance of the case on the ground that they had not had sufficient time to formulate a plan to carry out the decisions of the Supreme Court. That application for a continuance was extensively argued before the three-judge court and resulted in an order being entered to the effect that the school board had taken prompt steps in an effort to formulate a plan, that it needed more time to complete the formulation of the plan, and granting a continuance of the case as requested by the school board.

[*Tennessee Laws Invalid*]

Thereafter, the three-judge court was dissolved, since it appeared that no constitutional question was involved in the case in view of the concession made by the school board that the segregation laws of Tennessee must necessarily yield to the principles declared by the Supreme Court, that is, to the paramount authority of federal law.

The case was called on the docket when the court regularly convened at the October 1956 term, and at that time a motion was made by the school board to further postpone the case until after the meeting of the 1957 legislature of Tennessee on the assumption that the legislature would presumably pass some kind of legislation which might enter into the matter and have a bearing upon the kind of plan which the school board would submit to the Court.

That application was denied by the Court, and the case was set for hearing in November of 1956. It was heard at the time set. Testimony was taken from witnesses on both sides of the controversy, extensive arguments were made, and elaborate briefs were filed by both parties, the Court taking the case under advisement and holding it for some several weeks in order to give the issues mature and deliberate consideration.

The crucial question at that time was whether or not a gradual plan of integration would meet the constitutional tests laid down by the Supreme Court, more specifically whether or not a gradual plan of integration would be constitutional which contemplated as a first step desegregation only in the first grade, and thereafter desegregation of the remaining grades as might in the future be recommended by the instruction committee of the school board.

[*Plan Approved In Part*]

After giving the case what the Court believed was its very best effort, it was able to conclude that the plan was valid insofar as it proceeded on the basic principle that gradual desegregation was permissible and insofar as it contemplated desegregating the first grade in 1957. The Court believed that that was a substantial step, that the issue must be looked upon as presenting a local problem peculiar to the City of Nashville, about which the school board would have more knowledge than any other agency, certainly more knowledge than the Court itself could possibly have. Viewed in that light, the Court felt that the decision of the school board to desegregate the first grade as the first step should be respected and that the plan to that extent should be approved. However, the Court was unable to see that the plan was valid or constitutional insofar as it deferred all action with respect to remaining grades and only provided for further study to be made by the instruction committee with no particular obligation to submit any particular plan at any particular time; and consequently, that portion of the plan was disapproved, and the school board was requested to submit by December 31, 1957, a plan which would abolish compulsory segregation in the remaining grades of the school system together with a time schedule therefor.

The result so reached by the Court was strenuously resisted by the plaintiffs in the case, the plaintiffs taking the position that the plan presented was no plan at all, that it was not substantial, that it was not a prompt and reasonable start as required by the Supreme Court, and that since the school board had had ample time to study the matter and had not presented a substantial plan, the entire plan should be disapproved and all of the schools of Nashville required to desegregate simultaneously and immediately. That was the position of the plaintiffs in the case, but (as stated) the Court believed that the school board of Nashville from the very outset had acted in the utmost good faith to meet a very serious problem and to solve a problem having obviously many complications.

[*Tennessee School Preference Act*]

Now, after the Court so decided, the legislature of Tennessee in 1957 passed the law which is before us here today, the pertinent part of which reads as follows, omitting the caption of the act:

> "Section 1. Be it Enacted by the General Assembly of the State of Tennessee, That boards of education of counties, cities and special school districts in this state are authorized to provide separate schools for white and negro children whose parents, legal custodians or guardians voluntarily elect that such children attend school with members of their own race."

That act was passed in January of 1957, and the motion in this case to be permitted to file the supplemental answer and counterclaim to have rights declared under the act, was not filed until just recently, many months after the passage of the act.

[*Board Petitioned*]

In the meantime, however, the school board was met with a petition signed by thousands of citizens and parents of Nashville, requesting that the school board invoke the provisions of the School Preference Act of Tennessee, or at least take steps to have the act brought to the attention of the Court in order that it could be passed upon, and the rights of the school board declared.

It is in response to that petition, as I understand it, that this motion is filed by the school board to ask for instructions from the Court.

At the outset, I want to make it clear that I think that the School Preference Committee has acted in a perfectly normal and legal manner and in the true American way to bring the question to the Court's attention. It has not sought to resort to any kind of violence or to defy the authority of the law but rather to petition, as it has a legal right to do, under our constitution, the school board, and to make its wishes known; and the Court feels that the School Preference Committee is to be commended for the manner in which it has handled the cause which it represents. Also, the Court does not feel that it would be possible to say that the school board was negligent or did not act with due diligence or that the school board did not act in good faith in not bringing this matter to the attention of the Court sooner that it did, because I am confident that the members of the school board felt and probably their attorneys felt that the matter had already been passed upon

by the Court, its judgment had been entered, and that the School Preference Law could not enter into the picture at all, but that the order of the Court would have to be carried out; and therefore no action was taken until the petition was filed by the interested citizens. So I do not find in the case that the school board has acted in bad faith. On the contrary, I think it has acted in good faith from the very outset.

[*Board's Duty*]

I fully appreciate the fact that the school board is met with a very serious problem, one that has many complications, and no doubt involving many pressures; and the Court is gratified to see the firm way that it has gone about the discharge of its duties under the difficult circumstances which sometimes have prevailed. But the school board, just like this Court, is met with the duty to comply with the law of the land.

As already stated, the motion necessarily presents to the Court the question of whether or not this act of the Tennessee Legislature, Chapter 11 of the Acts of 1957, is a constitutional enactment. If it is on its face in conflict with the doctrine enunciated by the Supreme Court in the two Brown opinions, necessarily it must give way because of the Supremacy Clause of the federal constitution.

[*Arguments of Board*]

Various arguments have been presented here to the Court in an effort to sustain the validity of the act. It is argued by the school board and their attorneys, first, that the act should be sustained because it involves a principle of voluntary action which was in effect approved by a three-judge court in the case of Briggs v. Elliott, cited by this Court in its prior memorandum. It is further argued that the act is one which simply allows the parents of both races a choice or an alternative to send their children to schools of their own race or to schools of a mixed race, and that it does not involve enforced or compulsory segregation.

Furthermore, it is argued that the act applies only to school systems and not to individual schools, presumably that argument meaning that it would be possible under the act to set up one or more segregated schools so long as the entire system itself did not discriminate on account of race.

Another argument is that the principles declared by the Supreme Court of the United States apply only to units of government and not to individual citizens, and that the act of the Tennessee Legislature now under consideration confers upon the citizens themselves the right of preference or choice.

The arguments of the School Preference Committee are somewhat the same but with particular stress upon the right of freedom of choice, the right to be free from compulsion or restraint, it being argued generally that such freedom is a fundamental part of our law or a fundamental concept in our system of government, that this act seeks to give effect to that principle and, therefore, should be sustained.

[*Arguments of State*]

The State of Tennessee makes the argument that the constitutionality of the statute is not presented to the Court at this time and will not arise until the school board actually presents a plan which would set forth in what way the school board intends to use the School Preference Law; in other words, that the constitutionality of the act at this time is premature and should not be passed upon or determined by the Court until such time as the school board does present a plan which contemplates the use of the School Preference Law is some way or another. Furthermore, the State says that in any event this Court should not declare the act unconstitutional but, on the contrary, is required to convene a three-judge court before the act could be so declared.

[*Act Unconstitutional*]

After careful consideration of the arguments, all of which (I might say) the Court itself anticipated before they were presented here today, the Court is of the opinion that the Tennessee Public Act of 1957, Chapter 11, is on its face antagonistic to the principles declared by the Supreme Court in the two Brown cases and is, therefore, unconstitutional.

Referring to the two Brown cases and reading from the headnotes, we find in the first Brown case the following:

> "Segregation of white and Negro children in the public schools of a state solely on the basis of race, pursuant to state laws permitting or requiring such segregation, de-

> nies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment—even though the physical facilities and other 'tangible' factors of white and Negro schools may be equal."

In the second Brown opinion, the following appears in the headnote:

> "Racial discrimination in public education is unconstitutional," citing the first Brown case, "and all provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle."

Taking the Act of 1957, Chapter 11, and laying it alongside those declarations by the Supreme Court of the United States, it is manifest that the state statute is unconstitutional, for it says in so many words that boards of education of counties, cities, and school districts in this state are authorized (which is another way of saying "are permitted") to provide separate schools for white and Negro children whose parents, legal custodians, or guardians voluntarily elect that such children attend schools with members of their own race. In other words, the act would directly authorize the school board of the City of Nashville to take a census and then to set up separate white schools and separate schools for colored children, whose parents so elected.

[*Act Requires Discrimination*]

After those schools were so set up, they would not only be separate schools, but they would be separated because of race and for no other reason. In addition, the separation, once made, would be compulsory. In other words, no colored student thereafter would have a right to attend a school so designated as a white school regardless of the inconvenience involved or any other factor. The colored student would be denied the right to attend that school for white children solely because of his race, and the same thing, of course, would apply the other way. So the Court sees no alternative but to say that the act does not comply with the constitutional test that discrimination in public education because of race is abolished.

The arguments made to the contrary, to the effect that the act contemplates voluntary action cannot prevail. The transfer system which the Court approved in its memorandum opinion heretofore rendered, giving the colored students and the white students an equal right to transfer from one school to another, was a limited right, and the Court felt that it was reasonable under the circumstances and could be sustained. There was no compulsion connected with it, but the present act is a compulsory act in that it authorizes separate schools for the races from which members of the other race are excluded by law.

[*Application to School Systems*]

To the argument that it applies only to school systems and not to individual schools there are two answers. In the first place, I see no basis for saying that the doctrine declared by the Supreme Court applies only to school systems and not to individual schools. I think, on the contrary, that the Supreme Court principle applies to all schools, in other words, that discrimination in public education on account of race is prohibited.

In the second place, the argument is not sound because the act of the Tennessee Legislature applies to school systems as a whole. It does not say anything about individual schools. It applies to the entire system and gives the school board a right to take a census or a vote and determine the preference of all parents in the entire system, and then to set up segregated schools and thereafter to maintain them in that way.

The argument that the act applies to individual citizens and not to units of government is clearly unsound for the act specifically confers upon state agencies the authority to set up and maintain schools on a segregated basis. The school authorities are to determine the wishes of individuals only to the extent necessary to decide whether there shall be separate schools and, if so, how many, etc.

[*Not Voluntary Choice*]

The further argument that the act is merely one which involves the principle of voluntary choice is, of course, an oversimplification of the act and of the problem presented. It does have a voluntary element in it in that it permits or contemplates as a preliminary step that the preferences of the parents will be ascertained. But after preferences are once ascertained and the schools established, then this act says, in effect and in substance, that those

schools shall be compulsorily maintained thereafter as separate and segregated schools. That is the way the Court construes the act.

Of course, it is carrying the argument too far to say that no restraint can be placed upon citizens in connection with education and other matters. We all know that compulsion is an essential part of government. There are many laws that we do not like that we have to comply with. There are many people who do not like the ruling of the Supreme Court, but nevertheless it is the law of the land, and the duty of this Court to apply that law is clear and unmistakeable.

[*Three-judge Court*]

The argument that a three-judge court should be convened: As I see it, the requirement of a three-judge court does not apply to this case for two reasons: First, this act is patently and manifestly unconstitutional on its face. It so clearly conflicts with the Supreme Court decisions that it does not present a substantial federal question, and this Court therefore under the decisions has the right as a single court or judge to refuse to enforce rights under it without convening a three-judge court. Secondly, the statute requiring a three-judge court does not apply to a situation of this kind where the board of education in a case which has already been tried by a single judge is applying to that judge for instructions in carrying out its duties and as to what it shall do to comply with an order which the Court has already entered. In other words, what this Court is doing is merely enforcing its own order which it has already decided as a single judge and (by admission of the defendants) rightly decided as a single judge and not as a three-judge court. The application to this Court is not for an injunction to enjoin state action but a request for the Court to modify its order already entered. So, for that further reason, I do not believe that the requirement of a three-judge court applies in this instance.

As a practical matter, if a three-judge court should be convened in this case, it would be possible for the Court to refuse to vacate its order as to the first grade and to allow integration in the first grade to proceed, and we will, therefore, assume that it would cause no delay insofar as the first grade is concerned to convene a three-judge court. But it must be remembered that the prior order of this Court also required the board of education to submit a plan by December 31, 1957, for abolishing compulsory segregation in all of the remaining grades of the system.

[*Time Required for Three-Judge Court*]

Clearly, the board of education, if this state statute is not passed upon and a three-judge court is convened, cannot be expected to take any steps to formulate a plan for the other grades until the three-judge court does meet and does decide the case. All lawyers know the difficulty of convening a three-judge court, that is, the time which is required in doing so, having the court appointed and getting it together. As a practical matter, if this Court should undertake to convene a three-judge court, it would probably be long after December 31, 1957, before the court could act, which would mean that the order of the Court heretofore entered, requiring the submission of a further plan, would have to be vacated. Even if the Court could convene a three-judge court within a month from now or six weeks from now, there would be that much time wasted in the formulation of this further plan by the school board, time which it needs to study this serious problem.

The position of the State's attorneys, as friends of the Court, that the constitutional question is premature has been considered, but as I view the case a decision on the validity of the state law is directly presented and should be decided without delay. To overrule the motion for prematurity would leave the school board at sea to decide the question for itself and would probably result in the submission of a plan geared to the School Preference Law. This in turn would require its disapproval by the Court and hence further unnecessary delay in accomplishing desegregation in Nashville and compliance with the Supreme Court's ruling.

Therefore, the Court directs that an order be entered in this case, denying the motion to be permitted to file the supplemental answer and counterclaim.

ORDER

This cause came on to be heard on September 6, 1957 before the Honorable William E. Miller, Judge, upon motion by defendants for leave to file Supplemental Answer and Counter-Claim and to set the same for hearing, and upon argu-

ments in open Court by attorneys for defendants (movants), attorney for plaintiffs, attorneys for the State of Tennessee appearing as amicus curiae in support of the constitutionality of Chapter 11 of the Public Acts of Tennessee for 1957, and attorneys for the Parents Preference Committee as amicus curiae, the Court is of the opinion for reasons set forth in oral opinion which has been transcribed as "Statement from the Bench" and which is hereby ordered filed and made a part of the record, that said motion is not well taken.

It is accordingly ORDERED, ADJUDGED and DECREED that the motion for leave to file Supplemental Answer and Counter-Claim be and the same as hereby denied.

To the action of the Court defendants excepted on their own behalf, and, at the request of the Attorney General of the State of Tennessee, also on behalf of said State appearing as amicus curiae, and by request on behalf of the Parents Preference Committee appearing as amicus curiae.

EDUCATION
Public Schools—Tennessee

Robert W. KELLEY et al. v. BOARD OF EDUCATION OF THE CITY OF NASHVILLE, Davidson County, Tennessee, et al.

United States District Court, Middle District, Tennessee, September 12 and 16, 1957, Civil No. 2094.

SUMMARY: The prior orders and opinions in this case involving the integration of public schools in Nashville, Tennessee, are summarized above. At the opening of the September, 1957, term of the public schools when integration of the first grade had been scheduled under the court-approved plan, disorders and violence occurred in the vicinity of the schools. The school officials petitioned the court for an order restraining John Kasper and other named and unnamed persons from interfering with the carrying out of the court's prior order. A temporary restraining order was issued on September 12, 1957, and, following a hearing, a temporary injunction was issued. The petition and orders of the court, together with the statement of the court, are set out below.

Petition For Injunction

The petitioners are Mrs. W. O. Benson, Mrs. Tom A. Bland, Coyness L. Ennix, A. B. Gibson, O. B. Hofstetter, Sr., Maurice Pilsk, Elmer Lee Pettit, Price Carney and T. C. Young, members of and constituting the BOARD OF EDUCATION of the City of Nashville, Tennessee, and the CITY OF NASHVILLE, TENNESSEE, all of whom respectfully show to the Court:

I

The individual petitioners above named constitute the Board of Education of the City of Nashville, Tennessee, and are defendants in the above styled action.

The City of Nashville, Tennessee joins in this petition with the consent of the Board of Education of the City of Nashville and for the purpose of maintaining law and order within said City; the protecting of its citizens and of property therein; and the safeguarding of its system of public school education.

The City of Nashville, Tennessee requests permission of the Court to be petitioner in this cause.

II

On February 20, 1957 this Court entered a judgment in the above styled cause, which is recorded upon the minutes of the Court, in Vol. 19, pages 785-786. By the terms and provisions of said judgment, to which specific reference is made, there was approved a plan to comply with the constitutional obligation and to abolish compulsory segregation based upon race in grade one of the elementary schools of the City

of Nashville for the scholastic year beginning in September 1957.

Subsequent to the entry of said judgment, petitioners, constituting the Board of Education of the City of Nashville, proceeded to comply with the order embodied in said judgment and on August 27, 1957 conducted preliminary registration for students enrolling in the first grade. At the time of such registration there was certain confusion and disorder but no substantial disobedience or resistance to said judgment of this Court, or substantial efforts to induce such disobedience and resistance.

III

On Monday, September 9, 1957, the regular school term opened. At all schools which had previously been attended exclusively by white students and at which one or more Negro students had enrolled, there were threatening crowds, organized boycotts, acts of violence, picket lines, and other impediments to complying with said judgment of this Court. At the schools affected by such unlawful activities, crowds of persons, in some instances numbering hundreds of persons, congregated upon the school grounds or near the entrances and walkways thereof, molesting students, and especially threatening the Negro students and their parents when they sought to enter or leave the school. White parents were solicited to withdraw their children from such schools and to engage in a boycott thereof, notwithstanding the compulsory school attendance law of the State of Tennessee. Abusive language has been used and continues to be used toward the principal and teachers of the school, toward the pupils who attend the same and toward the parents of the pupils who escort their children to and from the schools.

In various instances there have been, and continue to be, acts of physical violence committed by persons in the unruly crowds assembled outside the schools and such crowds were continually harangued and incited by the defendants hereinafter named to make compliance with the judgment of this Court impossible and to threaten or intimidate all persons seeking to comply with said judgment.

Disorder continued throughout the school day Monday in various places and into the night on Monday night, September 9, 1957, with meetings being held on one or more school grounds and on the public square of the City of Nashville, at which agitators, including the defendants hereinafter named, undertook to arouse their listeners to defy the judgment of this Court and to prevent its accomplishment.

At about 12:30 A.M. on Tuesday, September 10, 1957, one of the elementary schools of the City of Nashville, to-wit, Hattie Cotton Elementary School, located at 1033 Greenwood Avenue, was badly damaged by a dynamite blast, willfully and deliberately set off because at this previously all white school, one Negro pupil had enrolled in the first grade on the preceding day. As a result of the acts of violence, intimidation, coercion and incitement, by the defendants hereinafter named, and other persons whose names are not known to the petitioners, and as a result of the organized boycott attempted and encouraged by said defendants and other persons, the attendance at the Nashville schools where Negro pupils have been enrolled for the first time has declined alarmingly and abruptly. Such boycott is being attempted and promoted by threats, chiefly by telephone calls, to parents asserting that they and their children will suffer bodily harm and injury if said children are permitted to attend said school.

The defendants hereinafter named have stated repeatedly and are now stating that this Court has no authority to order the abolishing of compulsory segregation in schools and to enter the aforesaid judgment and that said judgment should not be obeyed and should be defied, resisted and disobeyed. All of said defendants, and other persons whose names are unknown to petitioners, have stated it is their purpose and design to disorganize, disrupt and close down the schools of Nashville in every case where white pupils and Negro pupils are enrolled in the same school.

The defendants hereinafter named have continued their unlawful activities and are continuing the same, with the result that the parents of the students are withholding their children from school, either as part of an organized boycott designed to compel this Court to withdraw its prior judgment or by reason of the actual fear of violence and bodily harm resulting from threats and terrorizing tactics.

IV

Petitioners aver that John Kasper, of Knoxville, Tennessee, whose last known temporary address in Nashville, Tennessee was 2901 Scott Avenue, Fred Stroud, whose address is Curtis

Avenue, Bordeaux, John F. McCurrio of Albuquerque, New Mexico, whose last known temporary address is Y.M.C.A. in Nashville, Wilson Lee Brown, of 431 Broad Street, Nashville, James Jarrell, whose address in Nashville is unknown, Emmett A. Carr, of 4612 Leland Avenue, both individually and as chief officer in Davidson County, Tennessee of the Ku Klux Klan, Vincent A. Crimmons, 1513 Whites Creek Pike, Mrs. Margaret L. Conquest, 504 North Third Street, Mrs. Mary B. Stinson, 1004 North Fifth Street, J. A. Stinson, 1004 North Fifth Street, James Harris, Lock Road, and Paul McConnell, 1576 Delta Avenue, together with other persons whose names are not known to petitioners, have entered into and are carrying on a conspiracy to prevent compliance with the aforesaid judgment of this Court; and that they, acting in concert with others, have committed or participated in the acts and actions described in Section III hereof, as appears in more detail and particularly in affidavits filed with this petition, as follows:

Affidavit of James R. Gilliam
Affidavit of Howard Duck
Affidavit of L. T. Dickens
Affidavit of Charles E. Warren
Affidavit of J. C. Abernathy
Affidavit of A. T. Castleman
Affidavit of John W. Nolan
Affidavit of H. C. Webster
Affidavit of Marshall Jackson
Affidavit of James B. Bridgers
Affidavit of Miss Kathryn Millspaugh
Affidavit of Leonard H. Gamble
Affidavit of Margaret Cate
Affidavit of Miss Mary Brent
Affidavit of Miss Stella Mae Groomes
Affidavit of W. H. Oliver
Affidavit of Carney Patterson
Affidavit of Jack Stanfill

V

Petitioners aver that the sovereignty and dignity of the United States of America requires that the lawful judgments of this Court be enforced; that the City of Nashville is entitled to the support and protection of an injunction from this Court in furtherance of its efforts to suppress lawlessness and disorder resulting from a conspiracy to impede and defy such judgment; and that the school children of Nashville and their parents are entitled to a system of public education uninterrupted by and free from the pressures of unlawful activities.

VI

Petitioners aver that unless the defendants heretofore named are restrained by this Court, they and others acting in concert with them will continue to prevent and impede the Board of Education of the City of Nashville from complying with the aforesaid judgment of this Court, and further aver that it clearly appears from facts heretofore shown and from other specific facts shown by affidavits filed herewith that immediate and irreparable injury, loss and damage will result to petitioners before notice can be served and a hearing had thereon.

VII

PREMISES CONSIDERED, PETITIONERS PRAY:

1. That petitioner City of Nashville, Tennessee be allowed to join petitioners constituting the Board of Education as petitioners in this cause.

2. That this petition be filed and that proper notice of same be given to John Kasper, Fred Stroud, John F. McCurrio, Wilson Lee Brown, James Jarrell, Emmett A. Carr, Vincent A. Crimmons, Mrs. Margaret L. Conquest, Mrs. Mary B. Stinson, J. A. Stinson, James Harris and Paul McConnell, and all other persons who join with the herein named persons in an attempt to obstruct or impede compliance with the judgment of this Court in regard to abolishing compulsory segregation in the first grade of the City of Nashville schools.

3. That a temporary restraining order be granted enjoining and prohibiting John Kasper, Fred Stroud, John F. McCurrio, Wilson Lee Brown, James Jarrell, Emmett A. Carr, Vincent Albert Crimmons, Mrs. Margaret L. Conquest, Mrs. Mary B. Stinson, J. A. Stinson, James Harris and Paul McConnell, their officers, agents, servants, employees and attorneys, and other persons in active concert or participation with them from further interfering, by acts of trespass, boycott or picket, with the free operation of schools within the City of Nashville; from in any manner deterring the attendance at school of children within said City of Nashville and from in any manner threatening or intimidating the school children or their parents, or petitioners

constituting the Board of Education, their agents and employees, including the Superintendent, school principals, teachers and janitors; from taking any actions of any kind whatsoever which seek to compel by force, intimidation, threats or violence the violation or defiance of the judgment of this Court abolishing compulsory segregation based upon race in grade one of the elementary schools of the City of Nashville.

4. That at the hearing of this cause, an injunction issue permanently restraining John Kasper, Fred Stroud, John F. McCurrio, Wilson Lee Brown, James Jarrell, Emmett A. Carr, Vincent Albert Crimmons, Mrs. Margaret L. Conquest, Mrs. Mary B. Stinson, J. A. Stinson, James Harris and Paul McConnell, their officers, agents, servants, employees and attorneys, and other persons in active concert or participation with them from further interfering, by acts of trespass, boycott or picket, with the free operation of schools within the City of Nashville; from in any manner deterring the attendance at school of children within said City of Nashville and from in any manner threatening or intimidating the school children or their parents, or petitioners constituting the Board of Education, their agents and employees, including the Superintendent, school principals, teachers and janitors; from taking any actions of any kind whatsoever which seek to compel by force, intimidation, threats or violence the violation or defiance of the judgment of this Court abolishing compulsory segregation based upon race in grade one of the Elementary schools of the City of Nashville.

5. That petitoners have such other and further relief, including general relief, to which they may be entitled.

This is the first application for extraordinary process in this cause.

BOARD OF EDUCATION OF
THE CITY OF NASHVILLE

By /s/ Elmer Lee Pettit
CITY OF NASHVILLE

/s/ Reber Boult
/s/ Edwin F. Hunt
Attorneys for Nashville Board
of Education
By /s/ Ben West
Mayor

/s/ Raymond H. Leathers
City Attorney

Temporary Restraining Order

MILLER, District Judge.

In this cause it appearing from sworn petition of Mrs. W. O. Benson, Mrs. Tom A. Bland, Coyness L. Ennix, A. B. Gibson, O. B. Hofstetter Sr., Maurice Pilsk, Elmer Lee Pettit, Price Carney and T. C. Young, members of and constituting the Board of Education of the City of Nashville, Tennessee, and from sworn intervening petition of the City of Nashville filed with leave of the court that John Kasper, Fred Stroud, John F. McCurrio, William Lee Brown, James Jarrell, Emmett A. Carr, Vincent Albert Crimmons, Mrs. Margaret L. Conquest, Mrs. Mary B. Stinson, J. A. Stinson, James Harris and Paul McConnell, their officers, agents, servants, employes and attorneys, and others whose names are not known by the petitioners at this time, are hindering, obstructing and interfering with the carrying out of a judgment entered by this court of February 20, 1957, recorded upon the Minutes of the Court in Volume 19, Pages 785-786 in that they have requested and urged parents of students, pupils, and other persons to defy and violate the judgment of this court; have used abusive language toward the principals and teachers of the schools and toward pupils who attend the same and their parents; have been guilty of acts of violence, intimidation, coercion and incitement and have organized or attempted to organize boycotts of the public schools of Nashville and have placed, or attempted to place persons in actual fear of violence and bodily harm to prevent compliance with the aforesaid judgment of this court.

It further appearing to the court that the unlawful conduct of Kasper and the other named parties herein will continue unless a restraining order is issued prohibiting such unlawful acts and that if continued petitioners will suffer immediate and irreparable injury in that the system of public education in Nashville, Tennessee, will be damaged and partially paralyzed and persons may suffer physical harm.

It is ORDERED and DECREED by the Court

that the aforementioned persons, their agents, servants, representatives, attorneys, and other persons now or hereafter in active concert or participation with them, are enjoined and prohibited from further interfering, by acts of trespass, boycott or picket, with the free operation of schools within the City of Nashville; from in any manner deterring the attendance at school of children within said City of Nashville and from in any manner threatening or intimidating the school children or their parents, or petitioners constituting the Board of Education, their agents and employes, including the Superintendent, school principals, teachers and janitors; from taking any actions of any kind whatsoever which seek to compel by force, intimidation, threats or violence the violation or defiance of the judgment of this Court abolishing compulsory segregation based upon race in grade one of the elementary schools of the City of Nashville.

It is further ORDERED that the aforementioned parties appear before this Court in the United States Courthouse, Nashville, Tennessee, at one o'clock p.m. on Monday, September 16, 1957, and show cause why a preliminary injunction should not be issued.

This temporary restraining order is granted upon the giving of surety by the petitioners in the sum of $250.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained and is granted without notice to Kasper and the aforementioned persons because of the matters hereinbefore set out and other matters of like tenor set forth in the petition and in eighteen sworn affidavits filed with the petition and exhibits thereto, including pamphlets and numerous photographs, and because it has been made to appear to the Court that immediate action is necessary to safeguard the system of public education in Nashville, Tennessee, and to secure compliance with the aforesaid judgment of this Court.

The Court's Statement Delivered From The Bench

September 16, 1957

William E. Miller, Judge: There are two issues before this Court at this time. One is whether or not the preliminary injunction should issue as applied for, and, secondly, if the injunction is issued, the scope of it; that is, what the extent of the injunction should be.

A week ago or more, this case came before the Court again in connection with an application of the school board under the School Preference Law of Tennessee. At that time, the Court reviewed the history of the litigation, showing that the plan which had been presented to the Court was one which was promulgated by the school board after long and protracted study of the problem and after hearing the views of various groups of interested people in the City of Nashville.

[*Plan Adopted*]

The plan contemplated a moderate beginning toward integration in carrying out the ruling of the Supreme Court; that is, integrating the first grade in 1957.

After careful consideration of the matter, the Court was able to approve the plan, although a vehement argument was made that it should not be approved because it was not a substantial one and because it did not contemplate integrating more grades as the first step or stage in the process.

The Court, feeling that the state statute was simply another means of circumventing the ruling of the Supreme Court, in effect reordered that integration proceed in accordance with the school board's plan at the opening of the 1957 school year.

[*Board In Good Faith*]

The school board, in good faith, sought to carry out the order of the Court; and as I have repeatedly said in this proceeding, the school board has acted in good faith from the very beginning in recognizing that the Supreme Court decision was the law of the land and in seeking to comply with it in a reasonable way, considering the peculiar problems which existed in the City of Nashville.

The school board sought to put the order of the Court into effect in compliance with its duty, and when it did so, it precipitated a situation in the City of Nashville which very

nearly approached for some several hours' time, if not some several days' time, a reign of terror, certainly a reign of terror among those parents having children in the public schools, particularly in the first-grade schools.

It is not necessary to review the evidence here as to the acts of lawlessness and violence which took place in Nashville. Such acts are thoroughly established by the affidavits introduced in evidence.

The city authorities, including its chief executive and police force, were confronted with an emergency. It was incumbent upon them to meet the situation and to help enforce the orders of the Court, as well as to preserve the peace. I have no doubt that many of those persons who were burdened with the duty and the responsibility of enforcing the order of the Court probably did not personally agree that integration should take place, but nevertheless that did not stop them in the performance of their duty to uphold the laws of the land. Neither do I have any doubt that had it not been for the decisive way that the city authorities went about discharging their duties, the reign of terror which overwhelmed the city would have been much worse than it actually was.

Those same authorities who were confronted with the necessity of enforcing the order of this Court in the particular situation having applied to this Court for a preliminary injunction to restrain acts of violence, intimidation, coercion, etc.

[*Duty of Court*]

I feel that for this Court to refuse to issue an injunction as prayed for in the light of the facts which have been developed here, after it has been in good faith applied for by the city officials who have had the duty to enforce the Court's order, would simply be an abdication of the responsibility of the Court itself. The city officials feel that the restraining powers of this Court are necessary to preserve law and order within the city after what occurred heretofore. They rightfully feel, as this Court sees it, that if these persons are not restrained, there is no reason to suppose that they will not resort to the same kind of tactics which they heretofore used in an effort to defy the laws of the land. That is what it amounts to regardless of all of the schemes and subterfuges that one might try to resort to to dodge the real question and the real issue.

Therefore, without any hesitation whatsoever, the Court finds that the preliminary injunction as prayed for should be granted.

[*Scope of Injunction*]

With respect to the scope of the injunction, I think it should be borne in mind that the words of the actual restraining part of the injunction order itself must be read in context; that is, in the light of the fact that on certain days of last week, acts of violence did take place, efforts were made to intimidate parents of school children to keep their children away from the schools, threats of violence were made, valuable school property was destroyed, and other unlawful and irresponsible acts were resorted to. It is in that particular context that these words must be construed.

It may be that under normal circumstances (we will say) some kind of boycott or picketing might be permissible; but when it is conducted by large numbers with the clear purpose to violate the law and is accompanied by violence to the extent shown in this record, there can be no doubt that the Court has the right and, as I see it, the duty to enjoin both acts of boycott and picketing.

Something has been said in the record about the order being too broad as heretofore issued because it restrains the right of freedom of speech. As I see it, it does not impinge upon that right in any manner whatsoever. The right to speak freely does not include the right to persuade someone else to violate the law, as clearly stated by the Sixth Circuit Court of Appeals in the Kasper case on his appeal from his first conviction growing out of the Clinton violence. It is a misconstruction of this order to say that it would deter someone in conferring with one's neighbor about the question of integration, or in freely discussing the question, or in expressing his own personal disagreement with it, even peaceably advising someone not to send his child to an integrated school but to a private school. That kind of conduct is not proscribed by this injunction.

What the injunction aims at, as the Court construes it, is conduct which would lead to defying the order of the Court with respect to integration and particularly would deal with persons in active concert or participation with the named persons in this injunction; namely, Kasper and the other parties. Those words are qualifying words in this injunctive order.

[*Clinton Case Compared*]

This same language was specifically approved by the Eighth Circuit Court of Appeals. The Court carefully inquired about that when the temporary restraining order was applied for the other day, and it was found that the language proposed to the Court was taken verbatim from the order approved by the Eighth Circuit.

Comparing that language with the language in the Clinton case which was on appeal to the Sixth Circuit, we find that this language is more restrained and more restrictive than the language in the Clinton case; and I have the very definite conviction that the injunction which this Court heretofore issued (that is, the temporary restraining order) is the kind of order which is demanded by the circumstances which developed here in the city when the officers and the school authorities made a good-faith effort to carry out the order of the Court.

I think it is encumbent upon this Court to give the city officials, including the school board, the protection of this injunction. I think they are entitled to it. I think the people of Nashville are entitled to it. I think the public interest demands it.

I also find that the injunction should name specifically those heretofore named except one of the respondents who, I believe, was not served with process, and the respondent Brown who was not sufficiently connected with the conspiracy to violate the order of the Court. With those two exceptions, I think that all parties have been shown by substantial evidence to have participated in this concerted effort to defy the law and, therefore, that they should be included in the injunction.

Is there any further matter to be presented at this time?

(There was no response from any of the parties.)

I would like for the order to be presented to this Court to include a detailed findings of fact as to the grounds for the issuance of the injunction.

Order For Preliminary Injunction

This cause came on to be heard on motion of petitioners for a preliminary injunction and all parties except James Jarrell having been served with temporary restraining order and notice of hearing with respect to preliminary injunction, and all parties so served and notified except Emmett A. Carr having appeared in person or by attorneys and the Court having heard and considered the averments of the sworn petition and of the twenty-four affidavits with exhibits attached thereto in support of the petition and also having heard the evidence of witnesses, including respondents Fred Stroud, John F. McCurrio (Mercurio), Vincent (Vinson) Albert Crimmons, Mrs. Margaret L. Conquest, J. A. Stinson, Mrs. Mary B. Stinson, James Harris and Paul McConnell, and being advised in the premises, finds:

That the respondents and others whose names are not shown by the record at this time have been hindering, obstructing and interfering with the carrying out of a judgment entered in this cause on February 20, 1957 recorded upon the minutes of the Court in Vol. 19, page 785-786, by the terms and provisions of which judgment there was approved a plan to abolish compulsory segregation based upon race in grade one of the elementary schools of the City of Nashville for the scholastic year beginning in September 1957.

The Court further finds that the respondents hereinafter enjoined have acted in active concert and participation to prevent abolishing compulsory segregation in grade one of the public schools of Nashville and to prevent compliance with the aforesaid judgment of this Court, and, all of said respondents so acting in concert or participation, one or more of them have committed one or more of the following acts:

(a) requested and urged parents of students, pupils and other persons to defy and violate the aforesaid judgment;

(b) used abusive, derisive and threatening language toward members of the City Board of Education, and other school officials and employees, including the principals, teachers and janitors;

(c) have organized or attempted to organize boycotts of the public schools at which the abolishing of compulsory segregation in the first grade resulted in the attendance of pupils of both races;

(d) have engaged in picketing of schools at which the abolishing of compulsory segregation in the first grade resulted in the attendance of pupils of both races;

(e) have been guilty of acts of violence, intimidation, coercion and incitement designed to render the aforesaid judgment of this Court ineffective; and

(f) have placed or attempted to place persons in actual fear of violence and bodily harm with the purpose of preventing compliance with said judgment.

The Court further finds that the unlawful conduct of the persons hereinafter enjoined will continue unless a preliminary injunction is granted and that petitioners will suffer immediate and irreparable injury in that the system of public education in Nashville, Tennessee will be damaged and partially paralyzed and persons may suffer physical harm.

It is accordingly ORDERED and DECREED by the Court that John Kasper, Fred Stroud, John F. McCurrio (Mercurio), Emmett A. Carr, Vincent (Vinson) Albert Crimmons, Mrs. Margaret L. Conquest, J. A. Stinson, Mrs. Mary B. Stinson, James Harris and Paul McConnell, their agents, servants, representatives, attorneys and other persons now or hereafter in active concert or participation with them, are enjoined and prohibited from further interfering, by acts of trespass, boycott, or picket, with the free operation of schools within the City of Nashville; from in any manner deterring the attendance at school of children within said City of Nashville and from in any manner threatening or intimidating the school children or their parents, or petitioners constituting the Board of Education, their agents and employees, including the Superintendent, school principals, teachers and janitors; from taking any actions of any kind whatsoever which seek to compel by force, intimidation, threats or violence the violation or defiance of the judgment of this Court abolishing compulsory segregation based upon race in grade one of the elementary schools of the City of Nashville.

It is further ORDERED that no preliminary injunction shall issue as to Wilson Lee Brown and temporary restraining order heretofore granted as to said respondent is hereby vacated and on motion of the petitioners the petition as to said Wilson Lee Brown is dismissed.

It is further ORDERED that the bond heretofore given by petitioners and filed on September 12, 1957 shall remain in full force and effect for the payment of such costs and damages as may be incurred or suffered by any party who is found to be wrongfully injured or enjoined, the sureties on such bond having consented thereto.

It is further ORDERED that a copy of this preliminary injunction shall be served upon each of the respondents, accompanied by a copy of the petition for injunction and that each respondent shall have the period of twenty (20) days from the date of such service in which to file an answer.

EDUCATION
Public Schools—Tennessee

John KASPER v. D. J. BRITTAIN, Jr., et al.

United States Court of Appeals, Sixth Circuit, June 1, 1957, 245 F.2d 97.

SUMMARY: In a class action filed by Negroes in Anderson County, Tennessee, prior to the decision of the United States Supreme Court in the *School Segregation Cases*, a federal district court, on remand from the Court of Appeals for the Sixth Circuit, had directed the defendants in that action, county school officials, to admit pupils to the county high school on a racially non-discriminatory basis beginning with the fall, 1956, school term. *McSwain v. Board of Education of Anderson County*, 1 Race Rel. L. Rep. 317 (E.D. Tenn. 1956). At the opening of the school term the school officials petitioned the court for a restraining order, alleging that John Kasper and certain other persons were interfering with their compliance with the court's order. On August 29, 1956, the court issued a temporary restraining order against several named and unnamed persons. The following day a petition for contempt

citation was filed by the school officials against John Kasper, named in the restraining order, for having violated the order. The court convicted him of contempt for the violation and sentenced him to imprisonment for one year. *Sub nom., McSwain v. Board of Education of Anderson County*, 1 Race Rel. L. Rep. 872, 1045 (E.D. Tenn. 1956). Kasper appealed this conviction on the ground, among others, that the restraining order restricted his constitutional right of freedom of speech. The Court of Appeals, Sixth Circuit, affirmed, holding that freedom of speech does not extend to an incitement of illegal action and that the restraining order was a valid exercise of the court's enforcement powers as to its decrees. 245 F.2d 92, 2 Race Rel. L. Rep. 792 (1957). On appeal of the case to the Court of Appeals, the defendant also moved to strike the appearance of attorneys for the United States. The court overruled the motion, stating that the participation of the United States attorney was proper. [See also 2 Race Rel. L. Rep. 26, 317 and 795 for another contempt proceeding against Kasper and other persons arising out of this case.]

Before SIMONS, Chief Judge, and McALLISTER and MILLER, Circuit Judges.

PER CURIAM.

In addition to the appeal in the above cause, for review of a sentence for contempt of court, 6 Cir., 245 F.2d 92, there is also submitted therewith a motion to strike the appearance of attorneys for the United States. Upon consideration of the said motion, it appears from the record that the United States Attorney was invited to participate in the hearing by the District Judge, and that in that capacity he did not represent the Government but represented the appellees. His participation in the case approximated that of an amicus curiae and there is no procedural invalidity in his participation in the case nor any prejudice to the appellant for such assistance to the court as he was able to contribute. Wherefore,

The motion to strike is overruled.

EDUCATION
Public Schools—Texas

Hilda Ruth BORDERS, a minor, by her father and next friend, Louie Borders, Jr., et al. v. Dr. Edwin L. RIPPY, as President of the Board of Trustees of the Dallas Independent School District, et al.

United States Court of Appeals, Fifth Circuit, August 27, 1957, No. 16483.

SUMMARY: In a class action, Negro school children in Dallas County, Texas, sought a declaration of rights and injunctive relief in a federal district court with respect to their admission to public schools in that county on a nonsegregated basis. The district court refused a motion to convene a three-judge district court, found that the public school facilities furnished for white children and Negroes were substantially equal, and held that the United States Supreme Court's implementation decision in the *School Segregation Cases* required that integration be accomplished on the basis of planning to be done by the school officials and the lower courts. The district court further found that no such plan then existed and dismissed the suit without prejudice. *Bell v. Rippy*, 133 F.Supp. 811, 1 Race Rel. L. Rep. 318 (N.D. Tex. 1955). On appeal, the Court of Appeals, Fifth Circuit, one judge dissenting, held that there was no basis in the evidence nor in law for the action taken by the district court and vacated, reversed and remanded the cases. *Brown v. Rippy*, 233 F.2d 796, 1 Race Rel. L. Rep. 649 (1956). On the remand the district court, indicating that it would be a "civil wrong" to white pupils to admit Negroes to already crowded white schools, declined to issue an injunction and dismissed the case "in order that the school board may have ample time . . . to work out this problem." *Bell v. Rippy*, 146 F.Supp. 485, 2 Race Rel. L. Rep. 32 (N.D. Tex. 1956). The plaintiffs again appealed to the Court of Appeals for the Fifth Circuit from this dismissal. The Court of Appeals reversed the dismissal and remanded the case to the

district court with directions to enter a decree requiring the school officials to desegregate the schools "with all deliberate speed." The court stated that administrative remedies available to the plaintiffs had, in effect, been exhausted by the refusal of the school officials to admit them to the requested schools and they were not required to pursue further a futile remedy. 2 Race Rel. L. Rep. 805 (1957). On petition to the Court of Appeals for rehearing it was contended that recent Texas legislation (2 Race Rel. L. Rep. 695), which would debar a school district from receiving state funds if it was integrated without first obtaining an affirmative vote in an election held for that purpose, would result in large losses to the district if it complied with the court order. The Court of Appeals denied the petition for rehearing, stating that the legislation could not operate to relieve either federal or state officials of their duty to uphold the United States Constitution. [The order issued by the district court on remand in this case is reproduced below.]

Before RIVES, JONES, and BROWN, Circuit Judges.

PER CURIAM.

By petition for rehearing the appellees express their apprehension that, under the terms of an Act of the 1957 Texas Legislature approved by the Governor on the 23rd day of May, 1957, and to become effective on to-wit August 23, 1957,[1] their obedience to the order of the district court to be issued upon remand, pursuant to the directions of this Court, may result in the loss to the School District of some six million ($6,000,000.00) dollars a year of aid from the State of Texas and in the imposition by the State of penalties upon the persons carrying out such order. That Act, of course, cannot operate to relieve the members of this Court of their sworn duty to support the Constitution of the United States, the same duty which rests upon the members of the several state legislatures and all executive and judicial officers of the several states.[2] We cannot assume that that solemn sworn duty will be breached by any officer, state or federal. If, however, it should be, then the Board of Trustees of the School District and the persons carrying out the order to be issued by the district court are not without their legal remedies. The petition for rehearing is

DENIED.

1. Chapter 283 of the 1957 Texas Legislature, Vernon's Annotated Civil Statutes of Texas, Art. 2900(a).

2. "Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
"Clause 3. The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Constitution of the United States, Article VI.

EDUCATION
Public Schools—Texas

Hilda Ruth BORDERS et al. v. Dr. Edwin L. RIPPY, as President of the Board of Trustees of the Dallas Independent School District, et al.

United States District Court, Northern District, Texas, September 5, 19g7, Civ. No. 6165.

SUMMARY: [The summary of this case is set out above.] On the remand order of the United States Court of Appeals for the Fifth Circuit (see 2 Race Rel. L. Rep. 805) the district

court issued an order requiring the integration of the Dallas schools to be commenced at the mid-winter term (January, 1958). The text of the court's opinion upon the issuance of the order follows:

ATWELL, District Judge.

In the Dallas Independent School District there are approximately 119,000 children and one out of every six is a Negro. The school buildings are completely filled and white children will have to be displaced to allow Negro children to come in.

Apparently there is a difference in the scholastic aptitudes of white children and Negro children. There are not enough teachers available in the white schools to impart instructions to both Negro and white children because of the difference in the aptitudes of the two.

The Circuit Court of Appeals held that so long as scholars are excluded from any public school of their choice solely because of their color, that they are denied their constitutional rights.

A petition for a rehearing was later filed by the defendant and called further attention of the court to the fact that the Texas Legislature has passed a law which has been approved by the governor and which became effective Aug. 23, 1957, which would result in the loss to the defendants of six million dollars a year aid from the State of Texas which has heretofore been granted by the state to the Dallas Independent School District.

This motion for a rehearing was likewise denied by the Circuit Court of Appeals.

This court is now called upon to issue an order in accordance with the circuit court's directions. That order not only unsettles the tranquility of the Dallas public schools which has existed in a proud form for many years under which both the colored and white pupils have had equal school facilities and splendid teachers, but it also takes from the independent school district a large necessary amount of state funds if and when desegregation is ordered.

It is difficult, gentlemen, for me to approve such an order but this is the law of the land and it is my duty to do what I am ordered to by a higher court, and, I therefore ask you gentlemen of counsel to prepare an order in accordance with the rulings of United States Court of Appeals for this circuit as outlined in its opinion upon the original case and upon the motion for rehearing, and I should like to have you gentlemen of counsel to prepare the order to be approved by each of you as to form, ordering integration to be permitted in the coming mid-winter term of the schools and not before that time. Let your order contain the practical portion of the school board's division of districts and institution of schools.

EDUCATION
Public Schools—Virginia

Doris Marie ALLEN et al. v. The SCHOOL BOARD OF THE CITY OF CHARLOTTESVILLE et al.

United States District Court, Western District, Virginia, July 26, 1957, Civ. No. 51.

SUMMARY: A class action was brought by Negro school children in federal district court in Virginia against officials of the Charlottesville schools seeking their admission to the schools without regard to race or color. After hearing the court issued an injunction directing the admission of the plaintiffs to public schools at the fall, 1956, term. The injunction was suspended, however, pending an appeal. 1 Race Rel. L. Rep. 886 (1956). On appeal the Court of Appeals for the Fourth Circuit affirmed. 240 F.2d 59, 2 Race Rel. L. Rep. 59 (1956). The United States Supreme Court denied certiorari. 77 S.Ct. 667, 2 Race Rel. L. Rep. 300 (1957). The plaintiffs then moved in the district court that the suspension of the injunction be lifted and that integration be ordered for the September, 1957, term. The defendant school officials objected to the granting of that motion, contending that the re-

cently enacted Virginia Pupil Placement Act (Chapter 70, 1956 Acts, 1 Race Rel. L. Rep. 1109) prevented their assigning pupils to any particular school. The court agreed to continue the suspension of the decree pending a determination by the United States Supreme Court of the constitutionality of that act in another case (see 2 Race Rel. L. Rep. 808) but enjoined the enforcement of the act for that period.

PAUL, District Judge.

This action having come on to be heard on July 26, 1957, upon plaintiffs' motion to modify the judgment entered herein on August 6, 1956, to provide that the decree entered herein on August 6, 1956, be, in all its terms, effective as of the beginning of the school year in September 1957; and said motion having been argued by counsel.

And it appearing that the defendants object to the granting of said motion on the ground that by the provisions of Chapter 70 of the Acts of the Assembly of Virginia approved September 29, 1956, the defendants are without authority to determine the schools which pupils shall attend and all pupils in attendance in the schools of the State of Virginia are required to make application to the Pupil Placement Board provided by said Act and that plaintiffs herein have not made such application and that said Pupil Placement Board has had no opportunity to assign said pupils under the provisions of said Act.

It further being stated before the Court that the question of the constitutionality of said Act of Assembly above referred to has been the subject of litigation in the Eastern District of Virginia and that a judgment holding said Act in violation of the Constitution of the United States is now the subject of a petition for certiorari before the Supreme Court of the United States.

And it appearing to this Court that it is proper that the effective date of decree in this case should await the outcome of said petition for certiorari and determination of the Supreme Court of the United States as to the constitutionality of the said Pupil Placement Act.

NOW THEREFORE IT IS ORDERED that the injunction entered herein on August 6, 1956, be made effective at the commencement of the school semester next following the determination by the Supreme Court of the United States of the matters herein referred to.

IT IS FURTHER ORDERED THAT pending final determination by the Supreme Court of the United States of the questions herein referred to the defendants herein are enjoined and restrained from denying entrance to the public schools in the City of Charlottesville of any pupil because of failure of the parents or guardians of such pupil to apply for assignment to the Pupil Placement Board as provided for by the Act of Assembly approved September 29, 1956.

EDUCATION
Public Schools—Virginia

Clarissa S. THOMPSON et al. v. County SCHOOL BOARD OF ARLINGTON COUNTY, Virginia, et al.

United States District Court, Eastern District, Virginia, September 14, 1957, Civ. No. 1341.

SUMMARY: In a class action in federal district court, Negro school children in Arlington County, Virginia, had obtained an injunction against county school officials requiring their admission to schools without discrimination on the basis of race. 144 F.Supp. 239, 1 Race Rel. L. Rep. 890 (E.D. Va. 1956). On appeal the Court of Appeals for the Fourth Circuit affirmed, holding, in part, that the Virginia Pupil Placement Act (1 Race Rel. L. Rep. 1109) was inapplicable to the case. 240 F.2d 830, 2 Race Rel. L. Rep. 59 (1956); *cert. denied*, 77 S.Ct. 667, 2 Race Rel. L. Rep. 300 (1957). A motion was then made to the district court to amend the decree, which had required the removal of discrimination by January, 1957, for elementary students and September, 1957, for junior and senior high schools.

The school officials also moved to have the decree suspended pending a ruling by the Supreme Court on another case involving the constitutionality of the Pupil Placement Act. The court amended the decree so as to require admission of all school children on a racially non-discriminatory basis beginning in September, 1957, but declined to suspend the operation of the injunction. The court stated that the possible application of the Pupil Placement Act would be reached by it only in the event of a petition to enforce the injunction. 2 Race Rel. L. Rep. 810 (1957). Thereafter seven Negro pupils were denied admission to previously "white" schools in Arlington County because they had failed to apply to the state Pupil Placement Board for transfer. [The form adopted by the Virginia Pupil Placement Board for the assignment of pupils is set out *infra* at p. 1042.] They then moved in court for further relief and for enforcement of the court's order. The court directed the admission of the pupils to the schools applied for by September 23, 1957, stating that the admission of the pupils to public schools could not be denied on the basis of a failure to comply with the Pupil Placement Act. The injunction was, however, suspended pending appeal.

BRYAN, District Judge.

Seven Negro children of school age were refused admission as pupils in the public schools of Arlington County, Va., on the opening day of the current session. The ground of the refusal was that the applicants had not complied with, or obeyed, the provisions of the Pupil Placement Act of Virginia, 1956 Acts, Extra Session, c. 70. That statute requires every child before entering a public school for the first time, or on graduation from one school to another, to apply to the Pupil Placement Board for enrollment. In refusing the admission, the school principals were following the directions of the defendant County School Board and Superintendent who, in turn, were following the Act. These children, now called the plaintiffs, assert that the refusal violates the injunction previously entered by this court restraining the defendants from denying enrollment in any public school of the county, on account of race or color, to any otherwise qualified child. The plaintiffs move for a supplemental decree directing the admission of these children to the schools. The court will grant the motion.

[*Procedure Dilatory*]

I. In its injunctive decree the court took notice of existing and future State and local rules and administrative remedies for the assignment of children to public schools. It directed conformance with them before the complainant should turn to the court. Of course, the decree only contemplated reasonable regulations and remedies. Defendants' position that the Pupil Placement Act is such a regulation or remedy is untenable. The procedure there prescribed is too sluggish and prolix to constitute a reasonable remedial process. On this point we also rely upon the reasoning of the Court of Appeals for this Circuit in School Board of the City of Newport News et al. v. Adkins et al., July 13, 1957.

[*Approach to Act Now Different*]

It must be remembered that we are viewing the Act in a different frame from the setting in which it was tested by the Court of Appeals. The Act was then appraised as an administrative remedy which had to be observed before the persons aggrieved could seek a decree of judicial relief. Now the Act is measured against the enforcement of a decree already granted. It is, too, a decree which was passed before the adoption of the Placement Act and bears the approval of the final courts of appeal. For these reasons decision here need not await the outcome of the pending effort to obtain a review of the Court of Appeals' judgment.

This court had hoped that the initial step provided in the Placement Act might be isolated and utilized as a fair and practicable administrative remedy. It thought that a requirement that a pupil first entering a school, or transferring from one school to another, should seek placement from some official or board, would not only be a reasonable, but a necessary regulation as well, in the administration of the school. This agency, it seemed, might validly be a State agency exclusively—such as the Placement Board.

However, the court finds that it cannot fairly require the plaintiffs even to submit their applications to the Board for school assignment. The reason is that the form prescribed therefor commits the applicant to accept a school "which

the Board deems most appropriate in accordance with the provisions" of the Pupil Placement Act. Submission to that Act amounts almost to assent to a racially segregated school. But even if the form be signed "under protest," the petitioner would not have an unfettered and free tribunal to act on his request. The board still deliberates, on a racial question, under threat of loss of State money to the applicant's school if children of different races are taught there.

[*School Board Action Erroneous*]

II. The court must overrule the claim of the County School Board and Superintendent that they should not be held to answer for the denial of admittance to the plaintiffs. In this they urge that the Placement Board had sole control of admissions—that the School Board and Superintendent had been divested by the Act of every power in this respect. As just explained, the Placement Act and the assignment of powers of the Placement Board are not acceptable as regulations or remedies suspending direct obedience of the injunction. In law the defendants are charged with notice of these infirmities in the Board's authority. Actually the plaintiffs were denied admission by the defendants' agents—the school principals—while the defendants had the custody and administration of the schools in question.

Hence, the refusal by the defendants, immediately or through their agents, to admit the applicants cannot here be justified by reliance upon the Placement Board. The defendants were imputable, also, with knowledge that the injunction was binding on the Placement Board. The latter was the successor to a part of the School Board's prior duties; as a successor in office to the School Board, the Placement Board is one of those specifically restrained by the injunction.

[*Basis of Denial*]

III. We look, then, to see if race or color was the basis for the denial by the defendants and their agents of admission of the applicants to the named schools. It is immaterial that the defendants may not have intended to deny admission on account of race or color. The inquiry is purely objective. The result, not the intendment, of their acts is determinative.

In this inquiry we have no administrative decision with which to commence, save in one instance. Consequently, the court must examine the evidence in regard to each applicant and ascertain whether it indicates that the denial of admittance was there due solely to race or color. The court is not undertaking the task of assigning pupils to the schools. That is the function of the school authorities and the court has no inclination to assume that responsibility. Carson v. Warlick, 1956, 4 cir., 238 F. 2d 724, 728. But it is the obligation of the court to determine whether the rejection of any of the plaintiffs was solely for his race or color. In this light only does the court now review the evidence.

IV. Arlington is a small county in size, but thickly populated and having the appearance of a city. It has 22,677 (about) pupils in its public schools. Of these 1432 are Negroes—946 in the elementary schools, 311 in the junior high school (7th, 8th and 9th grades) and 175 in the senior high school (10th, 11th and 12th grades).

[*County School Data*]

All together there are 40 school buildings in the County. These include 4 schools for Negroes—one high school, Hoffman-Boston (combining junior and senior) located in the extreme southern end of the County and embracing an elementary school with it; and 2 other elementary schools, Drew-Kemper near the Hoffman-Boston, and Langston in the district to be mentioned in a moment as the northern Hoffman-Boston.

There are 2 high schools for the white children, Washington and Lee in and to serve the northern half, and Wakefield in and for the south half, of Arlington; there are 6 junior high schools, Stratford and Swanson among them, scattered throughout the County for the white children; and there are 28 elementary "white" schools, including Fillmore and Patrick Henry.

Each school and its contiguous territory form a school district. The boundaries of a district are drawn to include the school population in the vicinity of the school as far as the facilities of the school will allow. Before the creation of the Placement Board the pupils assignable to each school were, if otherwise eligible, limited to those who resided in the school district. These lines have never been altered by the School Board, but the defendants point out

that the Placement Board may or may not follow these bounds. Apparently it has done so.

Nothing in the evidence indicates that any of the plaintiffs is not qualified in his studies to enter the school which he sought to enter. Each applicant applied to a "white" school, but each lives in the district of that school or of another nearby "white" school. Nor did the evidence reveal a lack of space for him, or that the school did not afford the courses suited to the applicant. Counsel for the defendants explained that they did not adduce evidence as to the eligibility of the applicants for their respective schools because this was a matter within the purview of the Placement Board. Anyway, no intimation of disqualification appeared as to any applicant.

[*Race Was Ground of Denial*]

A review of the evidence is convincing that the only ground, aside from the provisions of the Placement Act, for the rejection of the plaintiffs was that they were of the Negro race. The rejection was simply the adherence to the prior practice of segregation. No other hypothesis can be sustained in any of the seven instances. The evidence as to the plaintiffs shows as follows:

(1) Rita and Harolyn Johnson, 15 and 16 years old, personally presented themselves for admission to the Washington and Lee High School on the opening day, Sept. 5, 1957. They desired to enter the 10th and 12th grades, respectively, and carried with them documentary evidence of their academic proficiency, having attended schools in the District of Columbia during the last school session. Their residence is 2901 North Lexington Street, in the northern extremity of the County. It was within the Washington and Lee School District and a distance of approximately 2 miles (air line) from the school. The two other senior County high schools were twice that distance from the Johnsons.

They were refused admission because they had not executed the board's placement forms. Their father declining to allow them to complete the forms, they are now attending school in the District of Columbia.

(2) Robert A. Eldridge, aged 9, wished to enter the 4th grade. As a new arrival in the county, his father had made application on August 15, 1957, for the enrollment of Robert in Fillmore, an elementary school. He procured a placement form but did not file it. On the opening of school Robert was refused admission into Fillmore for lack of the form.

This boy lives at First and Fillmore Street, a distance of slightly more than one city block from the Fillmore School, but is within the School District of Patrick Henry, an elementary school six city blocks away. A white child living there would normally enter either Patrick Henry or Fillmore. The nearest school used by colored children was 1.25 miles away.

(3) Leslie Hamm had completed the elementary courses at the County's Langston School and wanted to enter Stratford Junior High School. He was refused admission on the opening day of school at Stratford because he had not been assigned by the Placement Board, never having made application.

He resides at 1900 N. Cameron Street. This address is within what we describe as the northern Hoffman-Boston District. This district, however, is 3.5 miles from the Hoffman-Boston School and from the area around that school also designated as a Hoffman-Boston District. The northern Hoffman-Boston District is set apart apparently because the area is occupied predominately by negroes. However, a white child living in the northern District would be eligible to attend either the Swanson or Stratford Junior High School. Swanson is something more than a mile from the Hamm residence, Stratford slightly less than a mile.

(4) Louis George Turner and Melvin H. Turner, having respectively finished the seventh and eighth grades in one of the colored schools in the County, sought admission to the Swanson Junior High school on Aug. 22, as well as on the opening day. Not having filled out the placement form, they were both refused admission. They live at the intersection of 22d Street, North, and George Mason Drive. This is within the northern District of Hoffman-Boston. A white child in this section would ordinarily go either to Swanson or Williamsburg Junior High School. Swanson is less than a mile distant, while Williamsburg is about 1.25 miles away.

(5) George T. Nelson filled out a placement form and filed it on August 19 or 26 with the principal of Stratford Junior High School. On this application, the Pupil Placement Board assigned him to Hoffman-Boston School. On the opening day of school he was refused admission at Stratford.

Nelson lives at 2005 North Cameron Street. This is within the northern Hoffman-Boston Dis-

trict. Hoffman-Boston School is 6 miles from his home, while Stratford is ¼ mile away. Swanson Junior High School is a little further away. The basis for the Board's placement is not given; no reason is evident for ignoring Stratford or Swanson. It cannot be accepted, for it is utterly without evidence to support it.

[*Order to Issue*]

V. The defendants and their agents, in barring the admission of the complainants, did not intend any defiance of the injunction. The bona fides of their assurance to the court—that they believed they should not admit the applicants without an assignment by the Placement Board—cannot be doubted. However, the defendants and their agents must now understand that the injunction is paramount in the present circumstances and that they can no longer refuse admittance to the plaintiffs.

The injunction will affect the school attendance very slightly. Into a white school population of 21,245, only seven Negro children will enter; one Negro will be with 11,421 white children in the elementary grades; and no more than 6 Negroes among the 9,824 white high school students. Of 36 previously "all-white" schools in the County, 4 will be affected by the decree, and then not to a greater extent than 2 Negroes in any one of the 4 schools.

The supplemental decree will be effective at the opening of the schools Monday morning, September 23, 1957.

Supplemental Decree of Injunction

Upon consideration of the motion by and on behalf of Harolyn Johnson, Rita Johnson, Robert A. Eldridge III, George Tyrone Nelson, E. Leslie Hamm, Jr., Louis George Turner and Melvin H. Turner that the court enter a further decree specifically directing the defendants to admit them to the schools to which they have applied for admission for the session of 1957-58, and upon consideration of the evidence and arguments of counsel for all the parties on said motion, the court is of the opinion, on the findings of fact and conclusions of law this day filed, that said motion should be granted, and, therefore, it is

ORDERED that the defendants, their successors in office, agents, representatives, servants, and employees be, and each of them is hereby, restrained and enjoined from refusing to admit the said movants to, or enroll and educate them in, the said schools to which they have made application for admission, that is:

1. Harolyn Johnson in the Washington and Lee High School;
2. Rita Johnson in the Washington and Lee High School;
3. Robert A. Eldridge III in the Fillmore School or the Patrick Henry School;
4. George Tyron Nelson in the Stratford Junior High School or the Swanson Junior High School;
5. E. Leslie Hamm, Jr. in the Stratford Junior High School or the Swanson Junior High School;
6. Louis George Turner in the Swanson Junior High School; and
7. Melvin H. Turner in the Swanson Junior High School; upon the presentation by the said movants of themselves for admission, enrollment and education in the said schools commencing at the opening of said schools on the morning of September 23, 1957.

Let copies of this order be forthwith sent to counsel in this cause.

September 14, 1957.

Order

ORDER SUSPENDING
INJUNCTION PENDING APPEAL

This cause came on further to be heard on this 18th day of September, 1957, upon the defendants' motion praying for suspension and supersedeas of the injunction issued herein on the 14th day of September, 1957, pending the appeal which the defendants desire to take from the decree, and

It appearing to the Court that the defendants have stated good cause why this injunction should not be enforced pending appeal and have executed bond approved by the Court, it is

ADJUDGED, ORDERED and DECREED by the Court that the decree be suspended and that the injunction be suspended and superseded pending appeal.

EDUCATION
Private Schools—Pennsylvania

In Re: ESTATE OF STEPHEN GIRARD

Orphan's Court, Philadelphia County, Pennsylvania, No. 10, July Term, 1885, September 11, 1957.

SUMMARY: The will of Stephen Girard, who died in 1831, established a trust for the education of "poor white male orphans." The trust is administered now by a Board of City Trusts, consisting in part of elected officials of the City of Philadelphia and members appointed by the judges of courts of common pleas of the county. An eight-year-old Negro boy applied for admission to Girard College. His application was refused because he was not "white." Together with other rejected Negro applicants, he filed a petition in the Orphan's Court of Philadelphia County, claiming the limitation to "white" persons was invalid and seeking a review of the denial of his admission. That court denied the application, holding that the operation of Girard College by the Board of City Trusts pursuant to terms of the will is not "state action" under the Fourteenth Amendment to the United States Constitution (see 1 Race Rel. L. Rep. 613) and that the decision in the *School Segregation Cases* is not applicable since the College is not a public institution. 1 Race Rel. L. Rep. 325 (1955). The full bench of the Orphan's Court of Philadelphia County affirmed. 4 D. & C. 2d 671, 1 Race Rel. L. Rep. 340 (1956). The Pennsylvania Supreme Court, one justice dissenting, upheld the decision of the Orphan's Court denying the petition for admission, stating that the activity of public officials in administering the trust is not to be construed as "state action." 386 Pa. 548, 127 A.2d 287, 2 Race Rel. L. Rep. 68 (1956). The United States Supreme Court dismissed the appeal but, treating the appeal as a petition for writ of certiorari, reversed and remanded the case for further proceedings not inconsistent with its opinion. The per curiam opinion of the Supreme Court states that the "Board which operates Girard College is an agency of the State of Pennsylvania [and] . . . its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the state [which is] . . . forbidden by the Fourteenth Amendment." Sub nom. *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230, 77 S.Ct. 806, 2 Race Rel. L. Rep. 591 (1957). On the remand to the Pennsylvania Supreme Court, that court remanded the case to the Orphan's Court for further proceedings. Two justices dissented from the order of remand. 2 Race Rel. L. Rep. 811 (1957). On the remand the Orphan's Court found that the dominant purpose of Girard's will was to establish a school for "poor white male orphans" rather than to provide for the administration of the trust by city officials. The court dismissed the petition of the Negro applicants and directed the removal of the Board of Directors of City Trusts as trustee effective upon the appointment of a substitute trustee by the court.

This matter is again before us as the result of a mandate of the United States Supreme Court and an order of the Supreme Court of Pennsylvania entered pursuant thereto.

The United States Supreme Court, in its per curiam opinion dated April 29, 1957, states:

> "The Board* which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment. Brown v. Board of Education, 347 US 483, 98 L ed 873, 74 S Ct 686, 38 ALR2d 1180. Accordingly, the judgment of the Supreme Court of Pennsylvania is reversed and the cause is remanded for further proceedings not inconsistent with this opinion."

On June 28, 1957, the Supreme Court of Pennsylvania entered the following order:

> "The decrees of the Orphans' Court of Philadelphia County are vacated at the appellee's costs and the cause remanded for further proceedings not inconsistent with the opinion of the Supreme Court of the United States as set forth in its mandate."

* Referring to the Board of Directors of City Trusts of the City of Philadelphia.

It is a universally accepted rule of law that the disqualification or incompetency of a trustee shall not be permitted to defeat the purposes of a charitable trust, nor to impeach its validity, nor to derogate from its enforcement, the trustee must be fitted to the trust and not the trust to the trustee. We know of no decision of any court in the English-speaking world which challenges this rule of law. As a matter of fact, the Supreme Court of the United States, on two previous occasions in litigation dealing with the estate of the present testator, clearly indicated its adherence to this principle.

When this will was before the United States Supreme Court for the first time in Vidal et al. v. Stephen Girard's Executors, 43 U. S. (2 Howard) 127, 188, that court said:

> "It is true that, if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation [here the City of Philadelphia] was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust."

Again, in Girard v. Philadelphia, 74 U. S. (7 Wallace) 1, 12, the court stated:

> "Now, if this were true [that the city could not act as trustee] the only consequence would be, not that the charities or trust should fail, but that the chancellor should substitute another trustee."

In the course of the present proceedings, the Supreme Court of Pennsylvania, in a scholarly, well-reasoned opinion, carefully and fully reviewed the law and concluded (386 Pa. 548, 566):

> "But finally, even if the Board of Directors of City Trusts *were* deemed to be engaged in 'State action' in the administration of the Girard Trust, petitioners would nevertheless not be entitled to the remedy they seek. If the city, because bound in its public or governmental actions by this inhibition imposed upon it by the Fourteenth Amendment, cannot carry out a provision of Girard's will in regard to the beneficiaries of the charity as prescribed by him, the law is clear that the remedy is, not to change that provision, which, as an individual, he had a perfect right to prescribe, but for the Orphans' Court, which has final jurisdiction over the trust which he created, to appoint another trustee."

The Supreme Court of the United States has ruled, as a matter of Federal constitutional law, that the Board of Directors of City Trusts of the City of Philadelphia is an agency of the State of Pennsylvania and consequently forbidden by the fourteenth amendment from operating, even as a trustee of private funds, an establishment which excludes all but "poor white male orphans". This is the sole issue decided by that court. It did not rule, either directly or indirectly, that the testator's express wishes were to be disregarded and that the two Negro applicants were to be admitted to Girard College.

[*Primary Object*]

Stephen Girard, himself, and both appellate courts have defined the primary object of the trust to be the creation of an institution for "poor male white orphan children". The Supreme Court of Pennsylvania, which is the final arbiter of our State law, has unequivocally stated that if, for any reason, the Board of Directors of the City Trusts of the City of Philadelphia cannot continue to administer the trust in accordance with testator's directions, it becomes the duty of this court to remove it as trustee and to appoint a substituted trustee which can lawfully administer the trust in the manner prescribed by the testator.

Our course has been clearly charted. The highest appellate courts of the Nation and of this State have set forth the principles of Federal law and State law, respectively, which we must follow in finally disposing of the petitions which are the basis of this litigation.

In order to harmonize the opinions of the United States Supreme Court and the Supreme Court of Pennsylvania, we hold: (1) That the primary purpose of the testator to benefit "poor white male orphans", only, must prevail; and (2) that the disqualification of the board as trustee of this estate by the United States Supreme Court requires us to remove it from the administration of the trust and to appoint a substituted trustee, not so disqualified.

Accordingly, we reaffirm our previous ruling that William Ashe Foust and Robert Felder are not eligible for admission to Girard College because they are not "poor white male orphans".

We, therefore, enter the following

DECREE

And now, September 11, 1957, in obedience to the mandate of the United States Supreme Court dated June 11, 1957, and the order of the Supreme Court of Pennsylvania filed June 28, 1957, and in conformity with the opinion of the Supreme Court of Pennsylvania, dated November 12, 1956, it is hereby ordered and decreed that:

1. The petitions of William Ashe Foust and Robert Felder for admission to Girard College are dismissed.

2. The Board of Directors of City Trusts of the City of Philadelphia is removed as trustee of the estate of Stephen Girard, deceased, effective upon the appointment of a substituted trustee by this court.

3. The Board of Directors of City Trusts of the City of Philadelphia is directed to transfer and deliver the records and assets of the estate of Stephen Girard, deceased, to the substituted trustee, promptly, after such substituted trustee has been appointed and duly qualified.

4. The Board of Directors of City Trusts of the City of Philadelphia is directed to file an account of its administration of the estate of Stephen Girard, deceased, within six months after the date of this decree.

GOVERNMENTAL FACILITIES
Parks—Louisiana

Mandeville DETIEGE et al. v. NEW ORLEANS CITY PARK IMPROVEMENT ASSOCIATION et al.

United States District Court, Eastern District, Louisiana, May 27, 1957, Civ. No. 2601.

SUMMARY: A suit was brought in federal district court in New Orleans, Louisiana, seeking to have declared unconstitutional state laws of Louisiana and municipal ordinances of New Orleans denying Negroes admission to certain parks and recreational facilities of the city, and asking injunctive relief. After hearing the court found the statutes complained of to be violative of the Equal Protection and Due Process clauses of the Fourteenth Amendment and enjoined their enforcement.

WRIGHT, District Judge.

JUDGMENT

The Court, having considered the pleadings, affidavits and the entire record in this case, and for the reasons orally expressed on May 15, 1957, showing plaintiffs entitled to the relief prayed for:

IT IS ORDERED, ADJUDGED AND DECREED that all laws of the State of Louisiana and municipal ordinances of the City of New Orleans denying on the basis of race or color plaintiffs and others similarly situated the use of the facilities of New Orleans City Park are unconstitutional and void in that they deny and deprive plaintiffs and other Negro citizens similarly situated of the equal protection of the laws and due process of law secured by the Fourteenth Amendment to the Constitution of the United States and rights and privileges secured by Title 42, United States Code, Sections 1981 and 1983.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant New Orleans City Park Improvement Association, its successors in office, assigns, agents, servants, employees and persons acting on its behalf be and it is hereby permanently enjoined from denying and depriving to plaintiffs and other Negroes similarly situated solely on account of their race and/or color, the use of the New Orleans City Park and its facilities.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs have and recover from defendants their costs in this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this judgment shall become effective when it shall have become final after exhaustion of appeals.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a copy of this judgment be served on defendants.

TRANSPORTATION
Buses—Florida

Maggie GARMON et al. v. MIAMI TRANSIT COMPANY, Inc., et al.

United States District Court, Southern District, Florida, August 6, 1957, Civ. No. 7210-M.

SUMMARY: Negroes in Miami, Florida, brought a class action in federal district court seeking a declaratory judgment and injunctive relief against the operator of city buses, the City of Miami and the city commissioners. The suit asked that city ordinances and state laws requiring racial segregation in transportation facilities be declared unconstitutional and void and that the defendants be restrained from requiring the plaintiffs and other Negroes similarly situated to occupy segregated seating on city buses. The city filed a "defensive motion" and the transit company filed a motion to dismiss. On a hearing of these motions the plaintiffs moved for the appointment of a three-judge court. The court denied this motion, stating that it had already been determined by the United States Supreme Court that such ordinances and statutes are unconstitutional and void. The court granted the motion to dismiss as to the transit company because the relief sought, a declaration of the unconstitutionality of the statutes and ordinances, could not be granted as against the company. The motion to dismiss as to the city was denied. 151 F.Supp. 953, 2 Race Rel. L. Rep. 129 (1957). After a further hearing the court found the statutes complained of to be unconstitutional as violative of the Equal Protection and Due Process clauses of the Fourteenth Amendment and issued a permanent injunction against their enforcement.

CHOATE, District Judge.

This cause having come on for trial before the Court sitting without a jury on the 24th day of July, 1957, and the Court having heard argument of counsel and having considered the evidence presented thereat does find and hold as follows.

FINDINGS OF FACT

(1) The Plaintiffs herein are Negroes, citizens and residents of the United States, the State of Florida, and the City of Miami, presently and at all times material herein.

(2) The Defendants, Randall N. Christmas, James W. High, Otis Shiver, George W. DuBreuil and Bryant E. Hearn, Sr., are, and at all times material herein were, Commissioners of the Defendant City of Miami, Florida, a Municipal Corporation organized and existing under the laws of the State of Florida.

(3) On January 22, 1945, Sections 248 and 250 of Chapter 55 (Traffic and Vehicular Code) of the Code of the City of Miami, Florida, 1945, were adopted by the then City Commission of the Defendant City of Miami (Plaintiffs' Exhibit "1"). The said Sections 248 and 250 became effective on June 1, 1945, and were in full force and effect up to and including December 21, 1956, at which date, by virtue of Ordinance No. 5853 of the City of Miami, the said Sections 248 and 250 were renumbered and redesignated respectively as Sections 311 and 313 of the Code of the City of Miami, Florida, and are now in full force and effect.

(4) Said Section 311 of the Code of the City of Miami (Plaintiffs' Exhibit "1", formerly numbered Section 248) imposes a requirement upon all operators of busses that separate and equal accommodations in the busses be provided for white and colored passengers.

(5) Said Section 313 of the Code of the City

of Miami (Plaintiffs' Exhibit "1", formerly numbered Section 250) requires that bus drivers enforce the provisions of Section 311 and vests the drivers with police authority.

(6) The Defendants, their agents and servants, have by custom, practice and legal authority, enforced said Sections 311 and 313 and are continuing to so do to date.

(7) Counsel for the Plaintiffs and for the Defendant City of Miami have admitted in open Court that the unconstitutional City Ordinances involved in the case of Gayle v. Browder, 352 U.S. 903 (1956); Id. 142 F. Supp. 707 (M.D. Ala. 1956), are in all substantial respects identical to the Miami City Ordinances in the case at bar.

CONCLUSIONS OF LAW

(1) The Court has jurisdiction of the parties and the subject matter herein.

(2) Sections 311 and 313 of the Code of the City of Miami, Florida, which requires segregation of the white and colored races on the busses operated in the City of Miami, Florida, be and the same are hereby held to be unconstitutional in that they violate the due process and equal protection of law clauses of the XIV Amendment to the Constitution of the United States. Gayle v. Browder, 352 U.S. 903 (1956); Id. 142 F. Supp. 707 (M.D. Ala. 1956).

FINAL DECREE AND PERMANENT INJUNCTION

The Court having entered the above Findings of Fact and Conclusions of Law, it is,

ORDERED AND DECREED that the Defendants, their agents, servants, employees and successors in office, be and the same are hereby permanently enjoined as of the 1st day of September, 1957, from:

(a) Enforcing said Sections 311 and 313 of the Code of the City of Miami, Florida, and the segregation provisions of Chapter 352 (Sections 352.01 et seq.), Florida Statutes, 1955.

(b) Enforcing any other Ordinances of the City of Miami, Florida, or Statutes of the State of Florida, or other provisions of law which require segregation of the white and colored races on the motor busses or other similar types of vehicular transportation, of a common carrier of passengers in the City of Miami, Florida.

DONE AND ORDERED in Chambers at Miami, Florida, this 6th day of August, 1957.

TRANSPORTATION
Buses—Louisiana

Abraham L. DAVIS, Jr., et al. v. de Lesseps S. MORRISON et al.

United States District Court, Eastern District, Louisiana, May 24, 1957, Civ. No. 6418.

SUMMARY: A suit was brought in federal district court in New Orleans, Louisiana, seeking a declaratory judgment that Louisiana laws requiring racial separation on public transportation facilities in New Orleans are unconstitutional and asking for injunctive relief. After hearing the court determined that enforced segregation of Negro passengers on such facilities by law is violative of the federal constitution and laws. A permanent injunction, to become final upon exhaustion of appeals, was issued.

WRIGHT, District Judge.

JUDGMENT

This cause came on for hearing on plaintiffs' motion for summary judgment.

The Court, having carefully considered the pleadings, the record heretofore made in this cause, oral arguments and submission of the briefs by all parties and, after being fully advised in the premises, found in its opinion handed down orally on May 15, 1957 that the enforced segregation of Negro passengers solely because of race and/or color on buses, street cars, or street railways and trolley buses operating within the City of New Orleans, State of Louisiana, as required by La. R.S. 45:194, 45:195, 45:196, 45:731, 45:732 and 45:733, violates the Constitution and laws of the United States.

Now in accordance with that opinion it is

ORDERED, ADJUDGED AND DECREED that all laws of the State of Louisiana requiring segregation of the races on buses, street cars, street railways or trolley buses operating within the City of New Orleans are unconstitutional and void in that they deny and deprive plaintiffs and other Negro citizens similarly situated of the equal protection of the laws and due process of law secured by the Fourteenth Amendment to the Constitution of the United States and rights and privileges secured by Title 42, United States Code, Sections 1981 and 1983.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, their successors in office, assigns, agents, servants, employees and persons acting on their behalf, be and they are hereby permanently enjoined and restrained (1) from enforcing the aforesaid statutes requiring plaintiffs and other Negroes similarly situated to submit to segregation in the use of the buses, street cars, street railways and trolley buses, in the City of New Orleans, and (2) from doing any acts or taking any action which would require any public tranportation facility, or its drivers, to segregate white and Negro passengers in the operation of buses, street cars, street railways, or trolley buses in the City of New Orleans, State of Louisiana.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this judgement shall become effective when it shall have become final after exhaustion of appeals.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a copy of this judgment be served upon each of said defendants.

IT IS FURTHER ORDERED that defendants pay all costs.

TRIAL PROCEDURE
Petit Juries—Arkansas

Luther BAILEY v. STATE of Arkansas

Supreme Court of Arkansas, May 27, 1957, 302 S.W.2d 796.

SUMMARY: A Negro convicted of rape in an Arkansas state court appealed to the state Supreme Court on grounds, among others, that the trial court erred in overruling a motion to quash the regular and special panel of the petit jury. The motion to quash was made on the basis of an alleged systematic exclusion of Negroes from jury panels in the circuit in which he was convicted. The court found no evidence of such exclusion, stating that the right to trial by a jury of his peers does not include a right to have either a proportional number or any particular number of members of his race on the jury which tries him. The conviction was affirmed. Part of the court's opinion, by HOLT, J., follows:

* * *

In Assignments 6 and 7 appellant contends "that the court erred in not allowing the Jury Commissioners, for the March term 1952 to the March term 1956 inclusive, to testify, as these Jury Commissioners would have testified to the matters, allegations and other things set out in Luther Bailey's motion to quash the regular and special jury panels for the March 1956 term; that the court erred in overruling defendant's motion to quash the regular panel and the special panel of the petit jury."

Mr. Louis Rosteck, Deputy Clerk of the Circuit Court, testified in effect that his record shows that two Negroes were selected by the jury commissioners for the March 1952 term, out of a total of 24. It is the general procedure of this court to select 24 jurors on the regular panel and 12 alternates. These two Negroes actually served. There was one Negro on the jury panel for the September 1952 term. There were two Negroes selected for the March 1953 term. Five Negroes served during the September 1953

term; three were on the extra panel and two on the regular panel. For the special panel five jurors were selected out of 21. There is nothing to indicate on the record whether they were white or colored. There were two Negroes on the March 1954 term. There were 24 persons on the special panel; only five were selected. The record does not indicate whether the remainder were colored or white. Two Negroes were selected on the panel for the September 1954 term. There was a special panel for that term of 100 names; seven persons were selected; they were all white. He did not know whether the remaining people on the list were colored or white. Three Negroes served on the March 1955 regular panel. One person was used from the special panel of 100 names. Four Negroes were included in the 100. Only one person out of 100 was used on the September 1955 special panel. There were three Negroes on the regular panel. Three Negroes were selected on the regular panel for the March 1956 term. The first special panel selected has 150 names on it; it does not indicate colored and white. The first 100 on this list were ordered to report this morning; 27 of them are here; none are Negroes; * * * "Record of Poll Tax receipts issued in Pulaski County for the years 1954 and 1955.

Total number colored [1954] 10,180 14.8% [1955] 8,557 13.3%
Total number white [1954] 58,484 85.2% [1955] 55,980 86.7%

We think the court did not err in refusing to allow the jury commissioners to testify. They had not been subpoenaed to appear as witnesses and were not present. Furthermore, after the court had denied his request that they be permitted to testify, appellant failed to show what the jury commissioners would have said had they testified. See Turner v. State, 224 Ark. 505, 275 S.W.2d 24.

[*Proportional Representation*]

Appellant next argues that the above testimony of Louis Rosteck alone was sufficient to show racial discrimination. We do not agree. We think Rosteck's testimony,—which speaks for itself,—does not show an intentional and systematic limitation of Negroes on the jury list. The rule appears to be well settled that an accused is not entitled to a jury composed in part of members who are of his race. Cassell v. State of Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839; Akins v. State of Texas, 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692. Neither was appellant entitled to proportionate representation on the jury panels. "Fairness in selection has never been held to require proportional representation of races upon a jury. * * * The mere fact of inequality in the number selected does not in itself show discrimination," Smith v. State, 218 Ark. 725, 238 S.W.2d 649, 653. Also see State of Virginia v. Rives, 100 U.S. 313, 25 L.Ed. 667; Thomas v. State of Texas, 212 U.S. 278, 29 S.Ct. 393, 53 L.Ed. 512.

* * *

CRIMINAL LAW
Indians—Alaska

United States District Court, Alaska, May 15, 1957, 151 F.Supp. 132.

Petition of Emil McCORD for a Writ of Habeas Corpus.
Petition of Andrew NICKANORKA for a Writ of Habeas Corpus.

SUMMARY: Two Indians in Alaska were arrested by United States authorities in that territory and held under a charge of statutory rape. They petitioned the federal district court for their release under a writ of habeas corpus because statutory rape, although a crime in the territory of Alaska, is not one of the crimes listed in Title 18, United States Code,

Section 1153 [a] for which an Indian may be tried in United States courts if committed within "Indian country." The court found the contention to be correct and ordered the release of the prisoners.

McCARREY, District Judge.

This matter comes before the court upon a petition for a writ of habeas corpus.

Emil McCord is being held to answer for statutory rape. It is charged that he, being a male person 23 years of age, did carnally know and abuse a female person under the age of 16 years, to wit, 14 years of age. Andrew Nickanorka is held to answer on the same charge. It is alleged that he, being a male person 29 years of age, did carnally know and abuse another female person under the age of 16 years, to wit, 14 years of age.

While being held in custody by the United States Marshal to answer to the Grand Jury, the petitioners filed habeas corpus proceedings before this court to obtain their release from the United States Marshal, upon the grounds that it is contrary to the law to hold them upon the territorial crime of statutory rape, in that title 18 U.S.C. § 1153, makes such a crime inapplicable to the act charged. The petitioners allege that they and the female victims are full-blooded Indians and that they all reside at Tyonek, Alaska, which is within the limits of an area set aside for their use by Executive Order No. 2141, issued in 1915.

[*Tribal Organization*]

There is no dispute as to the fact that the petitioners and the victims are full-blooded Indians and that they and their ancestors, for a long period of time, have resided in this area set aside by the order *supra*, which is administered by the Alaska Native Service, an administrative unit of the Bureau of Indian Affairs. Further, that the tribe is governed by a council elected at general meetings of the tribe.

One of the petitioners testified at the hearing that the chief of the tribe, one Simeon Chickalusion, died on Easter Sunday and as of this date the tribe has not called a meeting to elect a new chief. He further testified that there are six members of the council and that these members are chosen by a vote of the members at a general meeting called for that purpose. Some testimony was adduced from this witness to the effect that the chief and the council take action to correct any infractions of the law set up by the council. The witness referred specifically to the violation of fish location jumping, fishing being the principal source of livelihood and income of this Indian tribe, since fur trapping has virtually become extinct, due to the depletion of fur-bearing animals.

[*Status of Tyonek*]

All of the inhabitants in that area, excepting one white school teacher who resides there a portion of the year, and a Hawaiian who is married to a member of the tribe, are all native Indians and members of the tribe.

The petitioners contend that the crimes alleged to have taken place were committed, if at all, within "Indian country" which is within the definition of 18 U.S.C. § 1151 et seq., and as a result thereof, they are outside the jurisdiction of the Territory of Alaska and its penal laws. Their additional argument is that the crime of statutory rape is not within any of the crimes set forth in 18 U.S.C. § 1153, which is more commonly referred to as the "Ten Major Crimes" statute, applicable to Indian offenses within Indian country.

The Government, on the other hand, takes the position that Tyonek is not within "Indian country", as defined in 18 U.S.C. § 1151, and that Alaska natives are in a different position as concerns the jurisdiction of criminal offenses than the Indians in the United States proper. The Government further contends that, in any

a. Title 18, United State Code, Section 1153 provides:
§ 1153. Offenses committed within Indian country.
Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
As used in this section, the offense of rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offense of rape upon any female Indian within the Indian country, shall be imprisoned at the discretion of the court.
As used in this section, the offense of burglary shall be defined and punished in accordance with the laws of the State in which such offense was committed.

event, the crime of statutory rape is within the provisions of 18 U.S.C. § 1153.

[*History of Legislation*]

The administration of criminal law in areas occupied by members of Indian tribal bodies has been the subject of prolonged legislative activity, extensively recited in the case of United States v. Jacobs, D.C.E.D.Wis.1953, 113 F.Supp. 203. Congress, for a considerable length of time, has removed the trial and punishment of criminal offenses from the courts of the states and territories of the United States within which the Indians are located and substituted federal jurisdiction over the major crimes and left the minor crimes to the tribal organization. United States v. Chavez, 1933, 290 U.S. 357, 54 S.Ct. 217, 78 L.Ed. 360. A number of reasons have been forwarded for this, two of which are covered in Ex parte Crow Dog, 1883, 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030, perhaps the leading case on this subject. The Supreme Court there ruled that the courts of the Territory of Dakota had no jurisdiction over members of the Sioux tribe within Indian country, reasoning that their independent status, established by treaty, evidences a Congressional intent to relieve them of the rule of the Territory, and, second, that the tribes must be protected from the restraints of a society they do not understand and into which they have not yet become assimilated. A third reason is suggested in United States v. Chavez, 290 U.S. 357, at page 361, 54 S.Ct. 217, 78 L.Ed. 360, that the federal court system may afford the Indian protection from a frequently unfriendly and occasionally hostile community until the time arrives when he is more adequate to defend himself. Perhaps a fourth reason has been the reluctance of the state authorities to assume the government of a large and tax-free population within its borders. Whatever may be the determinative reason behind this policy, Congress has evidenced an intent to continue the existing system by revising the legislation pertaining to this subject in 1948. 62 Stat. 757; 63 Stat. 94. At the same time, however, recent enactments of Congress removing certain areas in certain states from the exclusive jurisdiction of the United States Courts (67 Stat. 588, 18 U.S.C. § 1162) indicate an intent to place Indian peoples within the same society as their white neighbors just as rapidly as they are able to adapt themselves to that society. It is certainly to be desired that a time will come when there is no need for this type of legislation, but that time must be determined by Congress, not by this court.

The principal issue presented at the hearing on the writ was whether the Tyonek area fits within the meaning of "Indian country" in 18 U.S.C. § 1153. The Act defines the term as:

> "(a) all land within the limits of any Indian Reservation under the jurisdiction of the United States government * * * (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished * * *." 18 U.S.C. § 1151.

[*"Indian Country"*]

The Government's suggestion that the meaning of the terms is confined to lands reserved to the Indians by treaty is not compatible with this definition and their contention that the definition is as to areas within the several states seems also to be incorrect. The Supreme Court in the Chavez case, 290 U.S. 357, 54 S.Ct. 217, 220, defined the term "Indian country" as:

> "* * * any unceded lands owned or occupied by an Indian nation or tribe of Indians * * *."

I feel that this interpretation is broad enough to include an area, such as the Tyonek area, which is set aside and treated as Indian land, even though the executive order separating the land from the public domain fails to indicate its exact purpose. The Court of Appeals for this circuit has indicated that the recent amendments of the provisions applicable to these situations have served to enlarge the meaning of the term, rather than to diminish it. Williams v. U. S., 9 Cir., 1954, 215 F.2d 1; Guith v. U. S., 9 Cir., 1956, 230 F.2d 481. In this light, I think I am warranted in concluding that the Tyonek area is "Indian country."

[*Status of Alaska Indians*]

The prosecution's argument that Alaska natives have a different status than Indians of the

States is a rather novel concept which I regard as inaccurate. The district court in United State v. Kie, D.C.Alaska 1885, Fed.Cas.15,528a, indicated that the Territory of Alaska as a whole was not Indian country and that the natives of this area had not achieved independent status by treaty. With these observations I can concur, but I do not feel that this acts to remove them from the definitions of Congress otherwise applicable to them and not limited by the legislative pronouncement. See In re Sah Quah, D.C. Alaska 1886, 31 F. 327 in this regard. In view of the opinions expressed by these courts and the definition of Congress, however, any extension of the definition beyond those areas set apart from the public domain and dedicated to the use of the Indian people, and within which is found an operational tribal organization, would be unwarranted.

[*Statutory Rape*]

The next question is whether the crime of statutory rape is one of those crimes within the terms of 18 U.S.C. § 1153 of which the federal courts will take jurisdiction. The provision states:

> "Any Indian who commits against the person * * * of another Indian * * * any of the following offenses, namely * * * rape * * * shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. As used in this section, the offense of rape shall be defined in accordance with the laws of the State in which the offense was committed * * *."

In United States v. Jacobs, D.C., 113 F.Supp. 203, the court concluded, after an extensive discussion of the Congressional activities concerning the provision cited, that it was not the intent of Congress to include the offense of statutory rape or carnal knowledge of a female under a certain age in those crimes enumerated in the Act. The same conclusion has been reached by the Supreme Court of Wisconsin in State v. Rufus, 1931, 205 Wis. 317, 237 N.W. 67. The reasoning adopted in these cases is quite convincing and the deletion of a proposed amendment to the Act which would have provided for this offense would certainly indicate that Congress preferred to leave this matter to the tribal courts. At any rate, as the Jacobs case states, any doubt in this direction must be resolved in favor of the accused:

> "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute, unless clearly within its terms. There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute. [Citations.]" [113 F.Supp. 207]

[*Tribal Advances*]

We have no indication that the particular acts in question will subject the petitioners to punishment by the tribe. It is with interest that one observes the Indian race in the United States is fast advancing in the adoption of the white man's society. This is commendable and the realization of a goal sought. A large part of our Indian population is at last shedding the distrusts and fear of our society which they have evidenced in the past. Many are entering commercial activities with their Caucasian neighbors. A small but encouraging number have entered the professions and our institutions of education are beginning to feel the influx of Indian students, which has been so long desired, but until recently, little realized. The records of the past series of armed conflicts in which the United States has engaged illustrates a most commendable achievement by members of the Indian elements of our population. In the interest of further acquainting the members of the tribe with the society with which they must soon become members, it would certainly be injudicious to allow the petitioners to escape without any sanctions applied to them. However, the sanctions to be applied by the chief and the council must be left to the tribe, in the absence of Congressional action. United States v. Quiver, 1916, 241 U.S. 602, 36 S.Ct. 699, 60 L.Ed. 1196.

Since it follows as a corollary that if the Indian people want to take advantage of the opportunities afforded them under our democracy, there must, of necessity, and corollary to these opportunities, follow the paralleling responsibility of abiding by the laws and precepts of government that have been adopted by the white race and which have made our democracy great. However, I cannot avoid agreeing with

Judge Tehan in the Jacobs case, 113 F.Supp. 203, when he says:

> "It may well be that the description of the Indian people set out in Ex parte Crow Dog [109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030] is no longer warranted, and that the time has come to make Indians subject to more of the laws governing other citizens or residents of the United States. But this is a matter for the legislature and not the courts. It is for Congress to change a policy that has been long established and has been repeatedly recognized by the courts."

[*Release Ordered*]

This decision should not be interpreted by members of the native groups, be they Indian or Eskimo, as a general removal of the territorial penal authority over them, for the reason that this court will take judicial notice that there are few tribal organizations in Alaska that are functioning strictly within Indian country as defined in 18 U.S.C. § 1151 et seq. As I have said, only when the offense fits distinctly within the provisions of the applicable federal law will territorial jurisdiction be ousted. Testimony indicates that the Tyonek area, unlike most areas inhabited by Alaska natives, has been set aside for the use of and is governed by an operational tribal unit. Under these conditions, I can see no alternative but to order the release of the petitioners.

ORGANIZATIONS
Boycott—Alabama

State of ALABAMA ex rel. John PATTERSON, Attorney General v. TUSKEGEE CIVIC ASSOCIATION, an unincorporated association.

Circuit Court, Macon County, Alabama, In Equity, August 15, 1957, No. 2157.

SUMMARY: Concurrent with the adoption of legislation in Alabama which would have the effect of removing from municipal limits of the city of Tuskegee a number of previously registered Negro voters (Alabama Act 140, 1957, 2 Race Rel. L. Rep. 856), the Tuskegee Civic Association and individual Negroes allegedly proposed a "boycott" of merchants of the city by Negroes. The Attorney General of Alabama brought suit in a state court to enjoin the boycott and to restrain the Association and persons acting in concert with it from using force or coercion or other means to carry out the boycott. The court granted a temporary restraining order. Later, on September 9, 1957, the court denied a motion to dissolve the temporary restraining order.

Petition Filed by the Attorney General

TO THE HONORABLE JUDGES OF SAID COURT IN EQUITY SITTING:

The State of Alabama, on the relation of John Patterson, Attorney General of the State of Alabama, respectfully represents unto your Honors as follows:

1. The complainant, John Patterson, is the duly qualified Attorney General of the State of Alabama, and as such brings this action in the name of and for the State of Alabama.

2. The respondent, Tuskegee Civic Association, is an unincorporated membership association doing business in the State of Alabama, with its principal office of business in Tuskegee, Macon County, Alabama.

3. The respondent, Tuskegee Civic Association, was organized in Macon County, Alabama, in 1941, and, according to records obtained in the office of respondent, the alleged general objectives of respondent were to "promote through group action, the civic, economic, political, educational, social and religious well being of Macon County citizens." Also, according to said

records, the respondent was dedicated to a policy of "unrestricted citizenship for all Americans," and "unwaveringly opposed to legal enforced segregation based on racial identity." Also, according to said records, the respondent joined and worked with the Tuskegee branch of the National Association for the Advancement of Colored People, Inc., "to increase the effectiveness and efficiency of group action." The respondent began operating in Macon County, Alabama, in 1941, with approximately 50 members and has continuously operated since said date and presently is operating and doing business in Macon County, Alabama, and now claims a membership in excess of 1200 members. The respondent holds regular weekly meetings in Negro churches. The respondent maintains an office on the second floor of the Tuskegee Building and Loan Association Building, Old Montgomery Road, Tuskegee, Macon County, Alabama, which office and equipment it shares with the Tuskegee branch of the National Association for the Advancement of Colored People, Inc., an organization which is presently enjoined from conducting any business in the State of Alabama because of violation of State laws. The respondent maintains its files, membership lists, records, literature, mimeograph machine, typewriters, and other equipment in said office. The present officers of said association are as follows: G. C. Gomillion, President; Lyman B. Jefferies, Treasurer; and William P. Mitchell, Secretary. Respondent presently has the following standing committees: Membership Committee, Voter Franchise Committee, Political Action Committee, Economic Action Committee, Legal Redress Committee, and Community Welfare Committee. The chairmen of these committees are Della D. Sullins, William P. Mitchell, C. G. Gomillion, Lynwood T. Dorsey, Otis Pinckard, and James A. Johnson, respectively. A copy of the 1956 annual report of respondent association is attached hereto and made a part hereof and marked *Exhibit "A."* A photostatic copy of a statement of policy obtained from the office of respondent on July 25, 1957, setting forth the aims and purposes of respondent association is hereto attached and made a part hereof and marked *Exhibit "B."*

[*First Meeting*]

4. On June 25, 1957, respondent held a mass meeting for Negroes at Butler Chapter, A.M.E. Zion Church, in Macon County, Alabama, and approximately 2500 Negroes attended. At said meeting which was sponsored by the respondent, the officers, members and followers of respondent association, urged the Negroes present to refrain from trading or buying any goods or services from the white merchants of Tuskegee and Macon County, Alabama. C. G. Gomillion, President of respondent association, stated publicly to the Negroes at said meeting, "We will buy goods and services from only those who will recognize us and who will help rather than oppress us." Referring to the white citizens of Tuskegee, Alabama, C. G. Gomillion further stated at said meeting, "Soon the time will come when they will have to respect us. They may hate our guts but they will respect us." On June 26, 1957, Reverend K. L. Buford, Pastor of Butler Chapter, A.M.E. Zion Church, and a member of the respondent association, and adviser to the Executive Board of the respondent association, made a public statement that, "The boycott will continue as long as necessary in fighting the gerrymandering act. The economic squeeze can become permanent. We feel we can hold out longer than they. We feel we have been dealt with unjustly, but we will feel no animosity if the situation is altered." Immediately following this meeting the respondent association began conducting, financing, and carrying out a planned illegal boycott of the white merchants of the City of Tuskegee and the County of Macon, and have continued said illegal boycott since said date. Since said mass meeting on June 25, 1957, respondent as an association of individuals has carried out an organized campaign to prevent a large portion of the public from doing business with the white merchants of the City of Tuskegee, Macon County, Alabama, by means ranging from persuasion to threats and intimidation, including threats of physical violence and intimidation. A photostatic copy of a newspaper clipping from the Montgomery Advertiser, Montgomery, Alabama, dated June 25, 1957, is hereto attached and made a part hereof and marked *Exhibit "C."* A photostatic copy of a newspaper clipping from the Montgomery Advertiser, Montgomery, Alabama, dated June 26, 1957, is hereto attached and made a part hereof and marked *Exhibit "D."*

[*Second Mass Meeting*]

5. On July 2, 1957, respondent held a mass meeting for Negroes at the Washington Chapel, A.M.E. Church in Macon County, Alabama, and

approximately 2,000 Negroes attended. At said meeting which was sponsored by respondent association, the officers, members and followers of respondent urged the Negroes present to boycott the white merchants of Tuskegee, Alabama, and urged them not to buy any goods or services from said merchants. At said meeting the Reverend Martin Luther King, President of the Montgomery Improvement Association, Montgomery, Alabama, appeared as a guest speaker and stated to the Negroes present, "I am happy the day has come when you no longer pay to be mistreated. You are not seeking to put the stores out of business but to put justice into business." The Reverend K. L. Buford stated at said meeting as follows: "White people of Tuskegee have asked to be isolated in that area round the square. All right, I think they ought to have it." The Reverend Ralph Abernathy, a guest speaker at said meeting, stated to the Negroes present as follows: "The hour has come for all Negroes in Tuskegee and surrounding areas to get in the fight or for God's sake get out." A copy of a handbill printed and distributed by the respondent announcing the said mass meeting of July 2, 1957, is hereto attached and made a part hereof and marked *Exhibit "E."* Said handbill was circulated throughout Macon County, Alabama. A photostatic copy of a newspaper clipping from the Montgomery Advertiser, Montgomery, Alabama, dated July 2, 1957, is hereto attached and made a part hereof and marked *Exhibit "F."*

[*Ends Sought*]

6. On July 3, 1957, in an interview with Gertrude Cargile, a staff writer for the Birmingham News, Birmingham, Alabama, C. G. Gomillion, President of the respondent association, made the following statement in answer to a question as to what the boycott was supposed to gain for the Negroes: "That it was of no immediate value except to call to the attention of the public the plight of Macon County and that in the meantime those who cannot be satisfied with the simple needs that can be furnished by Negro businesses near Tuskegee Institute are travelling to Montgomery or Opelika for merchandise." Attached hereto and made a part hereof and marked *Exhibit "G"* is an affidavit by Gertrude Cargile, dated August 6, 1957.

7. On July 9, 1957, respondent held a mass meeting for Negroes at the Greenwood Missionary Baptist Church in Macon County, Alabama, and approximately 3,000 Negroes attended. At said meeting which was sponsored by respondent, the officers, members and followers of respondent, urged the Negroes present to boycott the white merchants of the City of Tuskegee and Macon County, Alabama. Dr. Stanley H. Smith, a member of the respondent association, urged the Negroes present at said meeting "to continue to fight." At said meeting, A. G. Gaston, a guest speaker, stated, "Your inconvenience in spending is good for you." Reverend S. T. Martin, a member of the respondent association, made the following public statement, "I am not boycotting myself, I buy my groceries in Montgomery and have always done so, but those who are engaged in this thing are doing it in retaliation. I would imagine that they are retaliating for not being allowed to vote." A photostatic copy of a newspaper clipping from the Montgomery Advertiser, Montgomery, Alabama, dated July 9, 1957, is hereto attached and made a part hereof and marked *Exhibit "H."* A photostatic copy of the speech made by the said A. G. Gaston dated July 9, 1957, is hereto attached and made a part hereof and marked *Exhibit "I."* A photostatic copy of a handbill printed and distributed by the respondent announcing the said mass meeting of July 9, 1957, is hereto attached and made a part hereof and marked *Exhibit "J."*

[*Handbills*]

8. On July 16, 1957, respondent held a mass meeting for Negroes at the Greenwood Missionary Baptist Church in Macon County, Alabama, and on July 23, 1957, respondent held another mass meeting for Negroes at Washington Chapel, A.M.E., Church in Macon County, Alabama, and on July 30, 1957, respondent held another mass meeting for Negroes at Washington Chapel, A.M.E., Church in Macon County, Alabama, and on August 6, 1957, respondent held another mass meeting for Negroes in Macon County, Alabama, and on August 13, 1957, respondent held another mass meeting for Negroes in Macon County, Alabama. At each of said meetings the officers, members, and followers of respondent association urged the Negroes present to boycott the white merchants of the City of Tuskegee and Macon County, Alabama. At the meeting on July 30, 1957, C. G. Gomillion, President of the respondent association, stated, "Since we have been thrown out of the city limits and

since our votes are not wanted, some of our people have decided that our dollars are not wanted either and we went elsewhere." A photostatic copy of a newspaper clipping from the Montgomery Advertiser, Montgomery, Alabama, dated July 16, 1957, is hereto attached and made a part hereof and marked *Exhibit "K."* Attached hereto and made a part hereof and marked *Exhibit "L"* is a clipping from the Montgomery Advertiser, Montgomery, Alabama, dated August 4, 1957. Photostatic copies of handbills printed and distributed by respondent announcing said mass meetings of July 23 and July 30, 1957, are hereto attached and made a part hereof and marked *Exhibits "M"* and *"N."*

9. The respondent has caused to be printed, published, circulated and distributed handbills urging the Negroes of Macon County, Alabama, not to trade or buy goods and services from the white merchants of Tuskegee and Macon County, Alabama. Photostatic copies of said handbills are hereto attached and made a part hereof and marked *Exhibits "O" through "V."* Attached hereto and made a part hereof and marked *Exhibits "W," "X," and "Y"* are photostatic copies of handbills found in the office of the respondent association on July 25, 1957, which urge the Negroes of Macon County to boycott the white merchants of Tuskegee and Macon County, Alabama.

[*Illegal Combination*]

10. Your complainant avers that the respondent has continuously since, to-wit, June 25, 1957, and is presently continuing to finance and carry out an illegal boycott of the white merchants of the City of Tuskegee and Macon County, Alabama, and your complainant further avers that respondent without just cause or legal excuse for so doing, and with malice, has entered into an illegal combination conspiracy, agreement, arrangement and undertaking for the purpose of hindering, delaying, and preventing the white merchants of Tuskegee and Macon County, Alabama, from carrying on their lawful businesses; and that said respondent has without just cause and legal excuse, and with malice, advised, encouraged, and taught the necessity, duty, propriety and expediency of carrying on an illegal boycott of the white merchants of said city and county; and that said respondent has caused to be published, printed and knowingly circulated and distributed handbills and other printed matter advertising, advising, teaching and encouraging the necessity, duty, propriety and expediency of carrying out an illegal boycott against the white merchants of said city and county; all of said acts being contrary to the statutes of the State of Alabama.

11. The complainant further avers that the aforesaid acts of respondent in financing, organizing, and carrying out said illegal boycott of the white merchants of the City of Tuskegee and Macon County, Alabama, are in violation of Chapter 20, Title 14, Code of Alabama 1940.

12. The complainant further avers that the aforementioned acts of the respondent in conducting, financing and carrying out said illegal boycott of said white merchants has caused and is continuing to cause irreparable injury and damage to the said white merchants of Tuskegee and Macon County, Alabama. Complainant further avers that beginning on the date after the first mass meeting sponsored by respondent on June 25, 1957, the gross sales of the said white merchants of said city and county fell off sharply, and since said date the said gross sales of said white merchants has shown a decrease of from, to-wit, 43% to 70% from what the gross sales were prior to the commencement by the respondent of said illegal boycott, and prior to the first mass meeting held by respondent on June 25, 1957. Attached hereto and made a part hereof and marked *Exhibits "Z" through "JJ"* are affidavits of white merchants of Tuskegee and Macon County, Alabama, showing said decrease in gross sales.

[*Intimidation*]

13. Complainant further avers that respondent, its officers, members and persons acting in concert with respondent, have used, and are presently using, and unless restrained from so doing, will continue to use, force, threats, intimidation, and other unlawful means to prevent citizens of Tuskegee and Macon County, Alabama, and others from trading with or buying goods and services from white merchants in Tuskegee, Macon County, Alabama, who are engaged in lawful occupations and businesses in said city and county. Attached hereto and made a part hereof and marked *Exhibits "KK" through "UU"* are affidavits from persons who have been threatened, intimidated, forced and coerced by respondent, its members and followers, in an effort to prevent said persons from

trading with white merchants in Tuskegee and Macon County, Alabama.

14. Your complainant further alleges that the actions of the respondent in conducting, financing and carrying out the illegal boycott against the white merchants of the City of Tuskegee and Macon County in violation of Chapter 20, Title 14, Code of Alabama 1940, and its actions in threatening, forcing, intimidating and coercing citizens of Macon County, Alabama, in an effort to prevent said citizens from buying goods and services from said white merchants, is disturbing and injuring the inhabitants of the entire community of Macon County, is annoying to the public generally, is subversive of public order, tends to breach the peace, and constitutes a public nuisance.

15. Your complainant further avers that the said illegal acts of respondent in carrying out said boycott constitutes an illegal combination in restraint of trade and is contrary to public policy and should be enjoined.

[*Economy Affected*]

16. Your complainant further avers that the aforementioned action of the respondent is calculated to destroy the economy of an entire city, and to destroy the means of livelihood for a large segment of the population of Macon County, and complainant avers that such actions are malicious and are causing irreparable injury and damage to the public welfare, and should be enjoined.

17. Your complainant further avers that the aforementioned acts of the respondent are causing irreparable injury and damage to the constitutional rights of the citizens of Macon County, and the State of Alabama, particularly the white merchants of Tuskegee and Macon County, Alabama. The right to conduct one's lawful business and earn a livelihood without wrongful and illegal interference, and the right to enjoy the good name and good will of such a business, is a valuable property right, granted to every citizen by the Constitution of the State of Alabama, and such right should be protected by the injunctive process. The aforementioned actions of the respondent is further calculated to destroy the business of white merchants of the City of Tuskegee and Macon County, and such action on the part of the respondent is a violation of the constitutional rights, liberties and privileges of white merchants of the City of Tuskegee and Macon County.

18. Your complainant further avers that the State of Alabama in its sovereign capacity is interested in the protection of its citizens from invasion of their legal and constitutional rights and when such acts, though they constitute a crime, interfere with the liberties, rights and privileges of citizens, the State not only has the right to seek an injunction to enjoin the commission of said acts, but it is its duty to do so.

19. Your complainant further charges that the respondent will continue, and is continuing, to violate the provisions of Chapter 20, Title 14, Code of Alabama 1940, and will continue to conduct, finance and carry out said illegal boycott against the merchants of the City of Tuskegee and Macon County, and will continue to use force, intimidation, threats and coercion against citizens of Macon County in Alabama and others to prevent them from trading with said merchants, unless restrained therefrom by order, judgment, and decree of this court.

20. Your complainant in his capacity as Attorney General of the State of Alabama further alleges that it is the duty of the State of Alabama to protect the interest, welfare, safety, constitutional rights and liberties of its citizens, and to protect the economic prosperity of the various communities of the State against such illegal acts as have been or are being committed by the respondent in carrying out said illegal boycott, and complainant further alleges that the acts of the respondent as above described constitute a public nuisance to the citizens of the State of Alabama and will continue to be a public nuisance unless the practice of the respondent be effectively restrained.

21. Complainant further avers that respondent will continue by illegal actions to injure the public interest and welfare of Macon County, State of Alabama, and will continue to violate the constitutional rights, privileges and liberties of the citizens of Macon County and the State of Alabama unless the actions of the respondent be effectively restrained.

22. Your complainant further avers that the said respondent should be restrained and enjoined from further committing the illegal acts as aforesaid and from further carrying out the illegal boycott against the white merchants of

the City of Tuskegee and Macon County so as to avoid a multiplicity of suits.

23. Your complainant further avers that the aforesaid illegal acts of the respondent in carrying out said illegal boycott is causing irreparable injury to the State of Alabama and its citizens for which there is no adequate remedy at law.

WHEREFORE, premises considered, your complainant further prays:

1. That this court will take jurisdiction of this bill of complaint and cause proper process to issue to the respondent herein requiring it to plead, answer or demur within the time required by law, or else suffer a decree pro confesso.

2. That this court issue a temporary injunction enjoining, restraining and prohibiting the above named respondent, Tuskegee Civic Association, an unincorporated association, its officers, members, agents, employees, servants, followers, attorneys, successor or successors, and all persons in active concert or participation with respondent, Tuskegee Civic Association, and all persons having notice of said order, from using any force, threats, intimidation, and coercion, to prevent any person from trading with or buying goods and services from any merchant in Tuskegee and Macon County, Alabama, who is engaged in operating a lawful business, and from further violating in any manner the provisions of Chapter 20, Title 14, Code of Alabama 1940, and from taking any part whatsoever in a combination or conspiracy for the purpose of hindering or injuring the merchants of the City of Tuskegee and Macon County, Alabama, in the carrying out of their lawful occupations or businesses.

3. That upon a final hearing, the court will issue a permanent injunction in accordance with the foregoing prayer for a temporary injunction.

And your complainant prays for such other and different relief that may be meet and just in the premises and as to which he is in equity and good conscience entitled.

JOHN PATTERSON,
Attorney General, State of Alabama

MacDONALD GALLION,
Chief Assistant Attorney General, State of Alabama

Decree for Temporary Restraining Order and Injunction

WALTON, Circuit Judge.

This cause, being submitted to the court upon application of the complainant, duly verified as required by law for a temporary restraining order and injunction as prayed for in the original bill of complaint filed in this cause, and upon consideration thereof, and of the evidence offered in support thereof in the form of sworn petition, exhibits attached thereto, and affidavits, and the State not having elected to give bond, the court is of the opinion same should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the court that the respondent, Tuskegee Civic Association, an unincorporated association, its officers, members, agents, employees, servants, followers, attorneys, successor or successors, and all persons in active concert or participation with respondent, Tuskegee Civic Association, and all persons having notice of this order, be, and they are hereby enjoined, restrained and prohibited, until further orders of the court from using any force, threats, intimidation, and coercion to prevent any person from trading with or buying goods and services from any merchant in Tuskegee and Macon County, Alabama, who is engaged in operating a lawful business, and from further violating in any manner the provisions of Chapter 20, Title 14, Code of Alabama 1940, and from taking any part whatsoever in a combination or conspiracy for the purpose of hindering or injuring the merchants of the City of Tuskegee and Macon County, Alabama, in the carrying out of their lawful occupations or businesses.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the court that the Sheriff of Macon County, Alabama, or any other lawful officer of the State of Alabama, serve a copy of the petition and this order upon respondent by service thereof upon any officer of respondent found within the County of Macon, State of Alabama.

DONE at LaFayette, Alabama, this the 15th day of August, 1957.

Motion to Dissolve Restraining Order Denied September 9, 1957

WALTON, Circuit Judge.

This cause is before the court upon the bill of complaint filed by the State of Alabama on the Relation of John Patterson, Attorney General of the State of Alabama, and against Tuskegee Civic Association, an Unincorporated Association.

The bill alleges that the respondent, Tuskegee Civic Association, is conducting a boycott of the merchants of the City of Tuskegee, Macon County, Alabama, by means ranging from persuasion to threats and intimidation, including threats of physical violence and intimidation, and the bill has attached to it and made a part of the same certain exhibits in the way of newspaper clippings, affidavits, and other matters.

This bill was presented to this court for a temporary injunction enjoining, restraining and prohibiting the respondent, Tuskegee Civic Association, its officers, members, agents, employees, servants, followers, attorneys, successor or successors, and all persons in active concert or participation with the respondent, Tuskegee Civic Association, from using any force, threats, intimidation and coercion, to prevent any person from trading with or buying goods and services from any merchant in Tuskegee and Macon County, Alabama, who is engaged in operating a lawful business, and from further violating in any manner the provisions of Chapter 20, Title 14, Code of Alabama 1940, and from taking any part whatsoever in a combination or conspiracy for the purpose of hindering or injuring the merchants of the City of Tuskegee and Macon County, Alabama, in the carrying out of their lawful occupations or businesses.

Upon the presentation of the bill to the court, the court issued a temporary injunction in accordance with the prayer of the bill of complaint.

[*Motion Filed*]

And on August 27, 1957, the respondent filed in this court its motion to dissolve the temporary injunction issued and granted by this court, and the respondent assigned in its motion for a dissolution of said temporary injunction the grounds as set out in said motion to dissolve.

Accordingly, the court fixed the 6th day of September, 1957, as the time for the hearing of the motion of the respondent to dissolve the temporary injunction.

And on the 6th day of September, 1957, this court convened at Tuskegee, Alabama in Macon County, for the purpose of hearing the motion of the respondent to dissolve the temporary injunction. On said day, to-wit, September 6, 1957, the complainant filed an affidavit of Joseph A. Malone; and on September 5, 1957, the respondent filed in support of its motion to dissolve the temporary injunction an affidavit of C. G. Gomillion; and on September 5, 1957, the respondent filed its answer in said cause, and said answer appears to deny the material allegations of the bill of complaint.

[*Hearing Held*]

On the day of the hearing, to-wit, September 6, 1957, an offer was made by the complainant to offer oral testimony, and objection was duly interposed by the respondent; and the court, in accordance with the law in such cases made and provided, refused to allow the complainant to offer oral testimony.

The hearing on the motion to dissolve the temporary injunction, therefore, proceeded with arguments of the attorneys both for the complainant and the respondent.

The position of the respondent is, among other things, that the Attorney General of the State of Alabama had no authority to institute this proceeding; that it is an injunction issued to prevent the commission of a criminal offense, and that, therefore, the court had no power to issue such temporary injunction; that there is no equity in the bill; and that the complainant has a plain, adequate and complete remedy at law.

The complainant asserts that it has the power to pray for the injunction on the ground that there is a conspiracy to violate the anti-boycott law of Alabama, and that such actions of the respondent amount to a public nuisance; and the complainant further claims that it does not have an adequate remedy at law, and that generally there is equity in the bill.

This is a cause solely on the motion of the respondent to dissolve the temporary injunction.

[*Court's Discretion*]

It has long ago been determined that the trial court exercises a large discretion as to the dissolution of injunctions. It has, also, been further established by our higher courts that, notwithstanding the denial of the answer, the court, of course, may retain the injunction until the final hearing of the cause on the merits.

It is, also, the settled law that the court should consider the effect upon the respective parties of a continuance or a dissolution of the temporary injunction, and the court should weigh the consequences that would probably result to the parties.

It was formerly the rule that an injunction should be dissolved on a complete denial in the answer; but it has been later established that the denial in the answer of the respondent is only one fact to be considered in hearing the motion to dissolve; so that now, upon the hearing of a motion to dissolve a temporary injunction, the question of continuing the injunction, notwithstanding the denial, is largely in the discretion of the court.

There is, also, established law in this state to the effect that upon consideration of the motion to dissolve the temporary injunction, the matter of relative injury to one party, with no resultant harm to the other of the parties, should be weighed, and if the retention of the injunction will do respondent no harm, while its dissolution will work irreparable injury to the complainant, the injunction should be retained for a final hearing of the cause.

Upon consideration, therefore, and for the reasons set out hereinabove, the court is of the opinion that said motion of the respondent to dissolve the temporary injunction is not well taken and ought to be overruled.

It is, therefore, ordered, adjudged and decreed by the court that the motion of the respondent to dissolve the temporary injunction in this cause be and the same is hereby overruled.

Done at LaFayette, Alabama this the 9th day of September, 1957.

LEGISLATURES

CIVIL RIGHTS LEGISLATION
"Civil Rights Act of 1957"—Federal Statutes

Public Law 85-315, 71 Stat. 634, (H.R. 6127) approved September 9, 1957, is an act "to provide means of further securing and protecting the civil rights of persons within the jurisdiction of the United States." The act authorizes the appointment of a federal Commission on Civil Rights to investigate and submit a final report; provides for an additional Assistant Attorney General; makes limited amendments in earlier civil rights statutes; provides for the protection of voting rights of persons in elections for federal office; places limitations on criminal contempt proceedings; and amends a prior statute regarding qualifications for federal jurors.

Public Law 85-315
85th Congress, H.R. 6127
September 9, 1957

AN ACT

To provide means of further securing and protecting the civil rights of persons within the Jurisdiction of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Part I—Establishment of the Commission on Civil Rights

SEC. 101. (a) There is created in the executive branch of the Government a Commission on Civil Rights (hereinafter called the "Commission").

(b) The Commission shall be composed of six members who shall be appointed by the President by and with the advice and consent of the Senate. Not more than three of the members shall at any one time be of the same political party.

(c) The President shall designate one of the members of the Commission as Chairman and one as Vice Chairman. The Vice Chairman shall act as Chairman in the absence or disability of the Chairman, or in the event of a vacancy in that office.

(d) Any vacancy in the Commission shall not affect its powers and shall be filled in the same manner, and subject to the same limitation with respect to party affiliations as the original appointment was made.

(e) Four members of the Commission shall constitute a quorum.

RULES OF PROCEDURE OF THE COMMISSION

SEC. 102. (a) The Chairman or one designated by him to act as Chairman at a hearing of the Commission shall announce in an opening statement the subject of the hearing.

(b) A copy of the Commission's rules shall be made available to the witness before the Commission.

(c) Witnesses at the hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.

(d) The Chairman or Acting Chairman may punish breaches of order and decorum and unprofessional ethics on the part of counsel, by censure and exclusion from the hearings.

(e) If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session; (2) afford such person an opportunity voluntarily to appear as a witness; and (3) receive and dispose of requests from such person to subpena additional witnesses.

(f) Except as provided in sections 102 and 105 (f) of this Act, the Chairman shall receive and the Commission shall dispose of requests to subpena additional witnesses.

(g) No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the Commission. Whoever releases or uses in public without the consent of the Commission evidence or testimony taken in executive session shall be fined not more than $1,000, or imprisoned for not more than one year.

(h) In the discretion of the Commission, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The Commission is the sole judge of the pertinecy of testimony and evidence adduced at its hearings.

(i) Upon payment of the cost thereof, a witness may obtain a transcript copy of his testimony given at a public session or, if given at an executive session, when authorized by the Commission.

(j) A witness attending any session of the Commission shall receive $4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Witnesses who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of $12 per day for expenses of subsistence, including the time necessarily occupied in going to and returning from the place of attendance. Mileage payments shall be tendered to the witness upon service of subpena issued on behalf of the Commission or any subcommittee thereof.

(k) The Commission shall not issue any subpena for the attendance and testimony of witnesses or for the production of written or other matter which would require the presence of the party subpenaed at a hearing to be held outside of the State, wherein the witness is found or resides or transacts business.

Compensation of Members of the Commission

Sec. 103. (a) Each member of the Commission who is not otherwise in the service of the Government of the United States shall receive the sum of $50 per day for each day spent in the work of the Commission, shall be reimbursed for actual and necessary travel expenses, and shall receive a per diem allowance of $12 in lieu of actual expenses for subsistence when away from his usual place of residence, inclusive of fees or tips to porters and stewards.

(b) Each member of the Commission who is otherwise in the service of the Government of the United States shall serve without compensation in addition to that received for such other service, but while engaged in the work of the Commission shall be reimbursed for actual and necessary travel expenses, and shall receive a per diem allowance of $12 in lieu of actual expenses for subsistence when away from his usual place of residence, inclusive of fees or tips to porters and stewards.

Duties of the Commission

Sec. 104. (a) The Commission shall—

(1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin, which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based;

(2) study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution; and

(3) appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution.

(b) The Commission shall submit interim reports to the President and to the Congress at such times as either the Commission or the President shall deem desirable, and shall submit to the President and to the Congress a final and comprehensive report of its activities, findings, and recommendations not later than two years from the date of the enactment of this Act.

(c) Sixty days after the submission of its final report and recommendations the Commission shall cease to exist.

Powers of the Commission

Sec. 105. (a) There shall be a full-time staff director for the Commission who shall be appointed by the President by and with the advice and consent of the Senate and who shall receive compensation at a rate, to be fixed by the President, not in excess of $22,500 a year. The President shall consult with the Commission be-

fore submitting the nomination of any person for appointment to the position of staff director. Within the limitations of its appropriations, the Commission may appoint such other personnel as it deems advisable, in accordance with the civil service and classification laws, and may procure services as authorized by section 15 of the Act of August 2, 1946 (60 Stat. 810; 5 U.S.C. 55a), but at rates for individuals not in excess of $50 per diem.

(b) The Commission shall not accept or utilize services of voluntary or uncompensated personnel, and the term "whoever" as used in paragraph (g) of section 102 hereof shall be construed to mean a person whose services are compensated by the United States.

(c) The Commission may constitute such advisory committees within States composed of citizens of that State and may consult with governors, attorneys general, and other representatives of State and local governments, and private organizations, as it deems advisable.

(d) Members of the Commission, and members of advisory committees constituted pursuant to subsection (c) of this section, shall be exempt from the operation of sections 281, 283, 284, 434, and 1914 of title 18 of the United States Code, and section 190 of the Revised Statutes (5 U.S.C. 99).

(e) All Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties.

(f) The Commission, or on the authorization of the Commission any subcommittee of two or more members, at least one of whom shall be of each major political party, may, for the purpose of carrying out the provisions of this Act, hold such hearings and act at such times and places as the Commission or such authorized subcommittee may deem advisable. Subpenas for the attendance and testimony of witnesses or the production of written or other matter may be issued in accordance with the rules of the Commission as contained in section 102 (j) and (k) of this Act, over the signature of the Chairman of the Commission or of such subcommittee, and may be served by any person designated by such Chairman.

(g) In case of contumacy or refusal to obey a subpena, any district court of the United States or the United States court of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a subcommittee thereof, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

APPROPRIATIONS

SEC. 106. There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, so much as may be necessary to carry out the provisions of this Act.

Part II—To Provide for an Additional Assistant Attorney General

SEC. 111. There shall be in the Department of Justice one additional Assistant Attorney General, who shall be appointed by the President, by and with the advice and consent of the Senate, who shall assist the Attorney General in the performance of his duties, and who shall receive compensation at the rate prescribed by law for other Assistant Attorneys General.

Part III—To Strengthen the Civil Rights Statutes, and for Other Purposes

SEC. 121. Section 1343 of title 28, United States Code, is amended as follows:

(a) Amend the catch line as said section to read,

"§ 1343. Civil rights and elective franchise"

(b) Delete the period at the end of paragraph (3) and insert in lieu thereof a semicolon.

(c) Add a paragraph as follows:

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

SEC. 122. Section 1989 of the Revised Statutes (42 U.S.C. 1993) is hereby repealed.

Part IV—To Provide Means of Further Securing and Protecting the Right to Vote

SEC. 131. Section 2004 of the Revised Statutes (42 U.S.C. 1971), is amended as follows:

(a) Amend the catch line of said section to read, "Voting rights".

(b) Designate its present text with the subsection symbol "(a)".

(c) Add, immediately following the present text, four new subsections to read as follows:

"(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

"(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

"(d) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

"(e) Any person cited for an alleged contempt under this Act shall be allowed to make his full defense by counsel learned in the law; and the court before which he is cited or tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, who shall have free access to him at all reasonable hours. He shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial or hearing, as is usually granted to compel witnesses to appear on behalf of the prosecution. If such person shall be found by the court to be financially unable to provide for such counsel, it shall be the duty of the court to provide such counsel."

Part V—To Provide Trial by Jury for Proceedings To Punish Criminal Contempts of Court Growing Out of Civil Rights Cases and To Amend the Judicial Code Relating to Federal Jury Qualifications

SEC. 151. In all cases of criminal contempt arising under the provisions of this Act, the accused, upon conviction, shall be punished by fine or imprisonment or both: *Provided however,* That in case the accused is a natural person the fine to be paid shall not exceed the sum of $1,000, nor shall imprisonment exceed the term of six months: *Provided further,* That in any such proceeding for criminal contempt, at the discretion of the judge, the accused may be tried with or without a jury: *Provided further, however,* That in the event such proceeding for criminal contempt be tried before a judge without a jury and the sentence of the court upon conviction is a fine in excess of the sum of $300 or imprisonment in excess of forty-five days, the accused in said proceeding, upon demand therefor, shall be entitled to a trial de novo before a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience, of any officer of the court in respect to the writs, orders, or process of the court.

Nor shall anything herein or in any other provision of law be construed to deprive courts of their power, by civil contempt proceedings, without a jury, to secure compliance with or to prevent obstruction of, as distinguished from punishment for violations of, any lawful writ, process, order, rule, decree, or command of the court in accordance with the prevailing usages of law and equity, including the power of detention.

SEC. 152. Section 1861, title 28, of the United

States Code is hereby amended to read as follows:

"§1861. Qualifications of Federal jurors

"Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—

"(1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

"(2) He is unable to read, write, speak, and understand the English language.

"(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service."

SEC. 161. This Act may be cited as the "Civil Rights Act of 1957".

Approved September 9, 1957.

LITIGATION
Virginia

A number of the acts of the 1956 Extra Session of the Virginia General Assembly which dealt expressly with public schools were printed at 1 Race Rel. L. Rep. beginning at p. 1091. Other enactments concerned, in general, with the regulation of litigation, solicitation of funds and other activities of persons and organizations dealing with litigation are set out below, pp. 1015 to 1025.

LITIGATION
Solicitation of Funds—Virginia

Chapter 31 of the 1956 Extra Session Acts of Virginia requires the registration and furnishing of certain information by persons, including organizations and corporations, who engage in the solicitation of funds for supporting litigation.

CHAPTER 31

An Act to require individuals, partnerships, corporations or associations who solicit funds to be used or who expend funds to finance or maintain litigation of others to file certain information with the State Corporation Commission; to prohibit solicitation of funds until such information has been filed; to provide penalties for violation; and to provide for injunctive relief from violations.

APPROVED SEPTEMBER 29, 1956

Be it enacted by the General Assembly of Virginia:

1. § 1. As used in this act the term "person" shall mean any individual, partnership, corporation or association, whether formally or informally organized. "Party" shall include an amicus curiae.

§ 2. No person shall engage in the solicitation of funds from the public or any segment thereof when such funds will be used in whole or in part to commence or to prosecute further any original proceeding, unless such person is a party or unless he has a pecuniary right or liability therein, nor shall any person expend funds from whatever source received to commence or to prosecute further any original proceeding, unless such person is a party or has a pecuniary right or liability therein, until any person shall first:

(1) If a partnership, corporation or association, file annually, in the month of January or within sixty days after the engaging in of any activity subject to this act, with the clerk of the State Corporation Commission (a) a certified copy of the charter, articles of agreement or association, by-laws or other documents, creating, governing or regulating the operations of such partnership, corporation or association if not of record in the office of the State Corporation

Commission; (b) a certified list of the names and addresses of the officers, directors, stockholders, members, agents and employees or other persons acting for or in behalf of such partnership, corporation or association; (c) a certified statement showing the source of each and every contribution, membership fee, dues payment or other item of income or other revenue of such partnership, corporation or association during the preceding calendar year and if required by the State Corporation Commission the name and address of each and every person or corporation or association making any donation or contribution; (d) a certified statement showing in detail by each transaction the expenditures of such partnership, corporation or association during the preceding calendar year, the objects for which made and any other information relative thereto required by the State Corporation Commission; and (e) a certified statement showing the locations of each office or branch of such partnership, corporation or association, and the counties and cities in which it proposes to or does finance or maintain litigation to which it is not a party.

(2) If an individual, file annually with the clerk of the State Corporation Commission (a) the home and each business address of such individual; (b) the name and address of any partnership, corporation or association for whom such individual acts or purports to act; (c) the names and addresses of all directors and officers of any such partnership, corporation or association; (d) a certified statement showing the source of each and every contribution, dues payment or membership fee collected by such individual during the preceding calendar year; and (e) a certified statement showing in detail by each transaction the expenditures made by such individual for the purpose of financing or maintaining litigation to which such individual is not a party.

§ 3. If any individual shall violate any provisions of this act he shall be guilty of a misdemeanor and may be punished as provided by law. If any partnership, corporation or association violates any provision of this act it may be fined not more than ten thousand dollars, and if a foreign corporation or association shall be denied admission to do business in Virginia, if not admitted, and if admitted, shall have its authority to do business in Virginia revoked.

§ 4. Any individual, acting for himself or as an agent or employee of any partnership, corporation or association, who shall file any statement, certificate or report required by this act, knowing the same to be false or fraudulent, shall be guilty of a felony and punished as provided in §§ 18-238 and 18-239 of the Code.

§ 5. Any individual acting as an agent or employee of any partnership, corporation or association in any activity in violation of this act shall be guilty of a misdemeanor and may be punished as provided by law.

§ 6. Any court of record having civil jurisdiction shall have power to enjoin violations of this act. A violation shall be deemed to have occurred in any county or city in which any partnership, corporation or association expends funds to commence, prosecute or further any judicial proceeding to which it is not a party or in which it has no pecuniary right or liability, or in which county or city it solicits, accepts or receives any money or thing of value to be used for such purpose, without having filed the information required in § 2, and the court or judge hearing the application shall have power to enjoin the violator from any violation of this act anywhere in this State.

§ 7. In any case in which a citizen files a statement with the Attorney General, alleging on information and belief that a violation of this act has occurred and the particulars thereof are set forth, the Attorney General, after investigation and a finding that the complaint is well founded, shall institute proceedings in the Circuit Court of the city of Richmond for an injunction to restrain the violation complained of, and such court is hereby vested with jurisdiction to grant the same.

§ 8. If a fine is imposed on any partnership, corporation or association for violation of the provisions of this act, each director and officer of such corporation or association, each member of the partnership, and those persons responsible for the management or control of the affairs of such partnership, corporation or association may be held jointly and severally personally liable for payment of such fine.

2. An emergency exists and this act is in force from its passage.

LITIGATION
Barratry—Virginia

Chapter 35 of the 1956 Extra Session Acts of Virginia defines and provides punishment for the crime of barratry. Barratry is defined as the stirring up of litigation.

CHAPTER 35

An Act to define the crime of barratry; to define certain terms; to prohibit barratry and to provide penalties for persons found guilty thereof; to prohibit aiding and abetting barrators; to authorize certain courts of record to enjoin barratry and to prescribe the officers who may bring suits therefor; to provide that conduct prohibited by the act shall constitute unprofessional conduct and be grounds for revocation of licenses to practice certain professions.

APPROVED SEPTEMBER 29, 1956

Be it enacted by the General Assembly of Virginia:

1. § 1. Definitions.

(a) "Barratry" is the offense of stirring up litigation.

(b) A "barrator" is an individual, partnership, association or corporation who or which stirs up litigation.

(c) "Stirring up litigation" means instigating or attempting to instigate a person or persons to institute a suit at law or equity.

(d) "Instigating" means bringing it about that all or part of the expenses of the litigation are paid by the barrator or by a person or persons (other than the plaintiffs) acting in concert with the barrator, unless the instigation is justified.

(e) "Justified" means that the instigator is related by blood or marriage to the plaintiff whom he instigates, or that the instigator is entitled by law to share with the plaintiff in money or property that is the subject of the litigation or that the instigator has a direct interest in the subject matter of the litigation or occupies a position of trust in relation to the plaintiff; or that the instigator is acting on behalf of a duly constituted legal aid society approved by the Virginia State Bar which offers advice or assistance in all kinds of legal matters to all members of the public who come to it for advice or assistance and are unable because of poverty to pay legal fees.

(f) "Direct interest" means a personal right or a pecuniary right or liability.

This act shall not be applicable to attorneys who are parties to contingent fee contracts with their clients where the attorney does not protect the client from payment of the costs and expense of litigation, nor shall this act apply to any matter involving annexation, zoning, bond issues, or the holding or results of any election or referendum, nor shall this act apply to suits pertaining to or affecting possession of or title to real or personal property, regardless of ownership, nor shall this act apply to suits involving the legality of assessment or collection of taxes or the rates thereof, nor shall this act apply to suits involving rates or charges or services by common carriers or public utilities, nor shall this act apply to criminal prosecutions, nor to the payment of attorneys by legal aid societies approved by the Virginia State Bar, nor to proceedings to abate nuisances. Nothing herein shall be construed to be in derogation of the constitutional rights of real parties in interest to employ counsel or to prosecute any available legal remedy under the laws of this State.

§ 2. It shall be unlawful to engage in barratry.

§ 3. A person found guilty of barratry, if an individual, shall be guilty of a misdemeanor, and may be punished as provided by law; and if a corporation, may be fined not more than ten thousand dollars. If the corporation be a foreign corporation, its certificate of authority to transact business in Virginia shall be revoked by the State Corporation Commission.

§ 4. A person who aids and abets a barrator by giving money or rendering services to or for the use or benefit of the barrator for committing barratry shall be guilty of barratry and punished as provided in § 3.

§ 5. Courts of record having equity jurisdiction shall have jurisdiction to enjoin barratry. Suits for an injunction may be brought by the Attorney General or the attorney for the Commonwealth.

§ 6. Conduct that is made illegal by this act on the part of an attorney at law or any person holding a license from the State to engage in a

profession is unprofessional conduct. Upon hearing pursuant to the provisions of § 54-74 of the Code, or other statute applicable to the profession concerned, if the defendant be found guilty of barratry, his license to practice law or any other profession shall be revoked for such period as provided by law.

2. An emergency exists and this act is in force from its passage.

LITIGATION
Maintenance—Virginia

Chapter 36 of the 1956 Extra Session Acts of Virginia makes it unlawful for a person not having direct interest in litigation to support with money or other assistance any proceeding before a court or administrative agency against the Commonwealth of Virginia or any of its agencies. Violation is made punishable by fine and imprisonment.

CHAPTER 36

An Act to make it unlawful for any person to induce another person to commence or prosecute proceedings in any court or before any board or administrative agency under certain conditions; to provide for the filing of affidavits; and to provide penalties for violations of this act.

APPROVED SEPTEMBER 29, 1956

Be it enacted by the General Assembly of Virginia:

1. § 1. (a) It shall be unlawful for any person not having a direct interest in the proceedings, either before or after proceedings commenced:

to promise, give or offer, or to conspire or agree to promise, give or offer, or

to receive or accept, or to agree or conspire to receive or accept, or

to solicit, request or donate,

Any money, bank note, bank check, chose in action, personal services or any other personal or real property, or any other thing of value, or any other assistance as an inducement to any person to commence or to prosecute further any original proceeding in any court in this State, or before any board or administrative agency within the said State, or in any United States court located within the said State against the Commonwealth of Virginia, any department, agency or political subdivision thereof, or any person acting as an officer or employee for either or both or any of the foregoing; provided, however, this section shall not be construed to prohibit the constitutional right of regular employment of any attorney at law, for either a fixed fee or upon a contingent basis, to represent such person, firm, partnership, corporation, group, organization or association before any court or board or administrative agency.

(b) It shall be unlawful for any person, not related by blood or marriage or who does not occupy a position of trust or a position in loco parentis to one who becomes the plaintiff in a suit or action, who has no direct interest in the subject matter of the proceeding and whose professional advice has not been sought in accordance with the Virginia canons of legal ethics, to advise, counsel or otherwise instigate the bringing of a suit or action against the Commonwealth of Virginia, any department, agency or political subdivision thereof, or any person acting as an officer or employee for either or both or any of the foregoing.

(c) As used in this act, "person" includes person, firm, partnership, corporation, organization or association; "direct interest" means a personal right or a pecuniary right or liability.

(d) Any person violating any of the provisions of § 1 of this act shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one thousand dollars or confined in jail for not more than one year, or both.

§ 2. Every person who commences or prosecutes or assists in the commencement or prosecution of any proceeding against one of the parties set forth in paragraph (a) of § 1 in any court in this State, or before any board or administrative agency therein, or who may take an appeal from any such rule, order or judgment thereof,

shall, on motion made by any of the parties to such proceedings or by the court or board or administrative agency in which such proceeding is pending, file with such court or agency, as a condition precedent to the further prosecution of such proceeding, the following affidavit:

I, (name of individual or corporation, organization or association, firm or partnership), petitioner (or plaintiff, appellant or whatever party he may be, or an officer thereof if a corporation, organization or association, firm or partnership) in this matter, do hereby swear (or affirm) that I have (or the corporation, organization or association, firm or partnership has) neither received, nor conspired to receive, nor have I (nor has the corporation, organization or association, firm or partnership), been promised or tendered any valuable consideration or assistance not permitted by law as an inducement to the commencement or further prosecution of the proceedings in this matter, nor has the same been instigated in violation of law.

(Signature of Affiant)
Affiant

Sworn to and subscribed before me on this, the (date) day of (month), 19 (year).

(Signature of Official Authorized to Administer Oaths)
(Title of Official)

In the case of any firm, corporation, group, organization, partnership or association required to make the above affidavit, such affidavit shall be made by the person having custody and control of the books and records of such firm, corporation, group, organization or association and one of the principal officers thereof.

Forms for such affidavit shall be furnished by the clerk of court, and shall have printed at the bottom thereof the text of § 4 of this act, under the heading "PENALTY".

§ 3. Every attorney representing any person, firm, partnership, corporation, group, organization or association in any proceeding in any court or before any board or administrative agency in this State or who may take an appeal from any rule, order or judgment thereof, shall, on motion made by any of the parties to such proceeding or by the court or board or agency in which such proceeding is pending, file, as a condition precedent to the further prosecution of such proceeding, the following affidavit:

I, (name), attorney representing (name of party), petitioner (or plaintiff, appellant or whatever party he may be) in this matter, do hereby swear (or affirm) that neither I nor, to the best of my knowledge and belief, any other person, firm, partnership, corporation, group, organization or association has promised, given or offered, or conspired to promise, give or offer, or solicited, received or accepted any valuable consideration or any assistance not permitted by law to said (name of party) as an inducement to said (name of party) to the commencement or further prosecution of the proceedings herein, nor has the same been instigated in violation of law.

(Signature of Affiant)
Affiant

Sworn to and subscribed before me on this, the (date) day of (month), 19 (year).

(Signature of Official Authorized to Administer Oaths)
(Title of Official)

Forms for such affidavit shall be furnished by the clerk of court, and shall have printed at the bottom thereof the text of § 4 of this act, under the heading "PENALTY".

§ 4. Every person or attorney who shall file a false affidavit shall be guilty of perjury and shall be punished as provided by law. Every attorney who shall file a false affidavit, or who shall violate any other provision of this act, upon final conviction thereof, shall also be disbarred by order of the court in which convicted. Any attorney who shall file a false affidavit, or violate any other provision of this act, and who is not a member of the Virginia State Bar, shall, in addition to the other penalties provided by this act, be forever barred from practicing before any court or board or administrative agency of this State.

§ 5. No person shall be excused from attending or testifying or producing evidence of any kind before a grand jury or before any court, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the provisions of this act on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subject to any penalty or forfeiture for, or on account of, any transaction, matter or thing, concerning which he may be required to testify or produce evidence, documentary or otherwise, before the grand jury or

court or in any cause or proceeding brought by the Commonwealth; provided, that no person so testifying shall be exempt from prosecution or punishment for perjury in so testifying. Any person who shall neglect or refuse to so attend or testify, or to answer any lawful inquiry, or to produce books or other documentary evidence, if in his power to do so, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment for not more than one hundred eighty days, or by both such fine and imprisonment.

§ 6. This act shall not be applicable to attorneys who are parties to contingent fee contracts with their clients where the attorney does not protect the client from payment of the costs and expense of litigation, nor shall this act apply to a mandamus proceeding against the State Comptroller, nor shall this act apply to any matter involving zoning, annexation, bond issues, or the holding or results of any election or referendum, nor shall this act apply to suits pertaining to or affecting possession of or title to real or personal property, regardless of ownership, nor shall this act apply to suits involving the legality of assessment or collection of taxes or the rates thereof, nor shall this act apply to suits involving rates or charges or services by common carriers or public utilities, nor shall this act apply to criminal prosecutions, nor to the payment of attorneys by legal aid societies approved by the Virginia State Bar, nor to proceedings to abate nuisances. Nothing herein shall be construed to be in derogation of the constitutional right of real parties in interest to employ counsel or to prosecute any available legal remedy under the laws of this State. The provisions hereof shall not affect the right of a lawyer in good faith to advance expenses as a matter of convenience but subject to reimbursement.

§ 7. Nothing in this act shall affect the provisions of Chapter 670 of the Acts of Assembly of 1956.

2. An emergency exists and this act is in force from its passage.

LITIGATION

Legislative Investigation—Virginia

Chapter 34 of the 1956 Extra Session Acts of Virginia authorizes the appointment of a joint committee of the General Assembly to oversee the enforcement of acts relating to champerty, maintenance, barratry, running and capping and other offenses concerning litigation and to the general administration of justice in the Commonwealth.

CHAPTER 34

An Act to create a joint committee of the General Assembly to study and report upon the administration and enforcement of certain statutes; to prescribe the powers of such joint committee; to provide for the selection, terms of office and compensation of the members of such committee; and to require reports from the committee to the General Assembly.

APPROVED SEPTEMBER 29, 1956

Be it enacted by the General Assembly of Virginia:

1. § 1. There is hereby created a joint Committee of the General Assembly to be known as the Committee on Offenses Against the Administration of Justice, hereinafter referred to as Joint Committee. Such Joint Committee shall investigate and determine the extent and manner in which the laws of the Commonwealth relating to the administration of justice are being administered and enforced and shall specifically direct its attention to the administration and enforcement of those laws relating to champerty, maintenance, barratry, running and capping and other offenses of any other nature relating to the promotion or support of litigation by persons who are not parties thereto. The Joint Committee shall be composed of five members to be selected as follows: Three of the members shall be appointed by the Speaker of the House of Delegates from the membership of the House

Committee for Courts of Justice and two of the members shall be appointed by the President of the Senate from the membership of the Senate Committee for Courts of Justice. Members shall serve on the Joint Committee during the effective period of this act; the presiding officer of each house shall have the power to fill vacancies occurring on the Joint Committee. The Joint Committee shall meet at least once in each three month period and oftener on call of the chairman or a majority of the members. The members of the Joint Committee shall receive the same salary and expenses for each day spent in the performance of their duties as is allowed under §§ 14-29.1 and 14-5 of the Code of Virginia, respectively, to be paid from the contingent fund of the General Assembly together with any other expenses incurred by the Joint Committee. The Joint Committee is hereby specifically vested with the powers and duties conferred upon committees of the General Assembly by § 30-10 of the Code of Virginia and any other provisions of law under which powers are conferred upon committees of the General Assembly. In addition to the foregoing powers, the Joint Committee shall be empowered to administer oaths and examine witnesses and may employ counsel to assist in its investigations. The Joint Committee may, in addition to the procedure provided in § 30-10 of the Code of Virginia, compel attendance of witnesses or production of documents by motion made before the circuit or corporation court having jurisdiction of the person or documents whose attendance or production is sought. The court, upon such motion, shall issue such subpoenas, writs, processes or orders as the court deems necessary.

§ 2. All officers and agencies of the State shall assist the Joint Committee in the discharge of its duties.

§ 3. The Joint Committee shall have plenary power to oversee the administration and manner of enforcement of the several statutes set forth in § 1 hereof, and, not later than sixty days preceding the next regular session of the General Assembly, it shall make a written report to the General Assembly upon the administration and method of enforcement of said statutes and shall set forth in its report its findings and recommendations and drafts of any amendatory legislation the Joint Committee deems desirable.

2. This act shall be effective until the convening of the next regular session of the General Assembly.

3. An emergency exists and this act is in force from its passage.

ORGANIZATIONS
Registration—Virginia

Chapter 32 of the 1956 Extra Session Acts of Virginia announces the public policy of the state to promote interracial harmony and requires the registration and furnishing of certain information by organizations which promote or oppose legislation of a racial nature or which advocate racial integration or segregation or whose activities tend to cause racial conflict.

CHAPTER 32

An Act to promote interracial harmony and tranquility and to that end to declare it to be the public policy of the State that the right of all people to be secure from interracial tension and unrest is vital to the health, safety and welfare of the State; to require registration of persons and organizations engaged in promoting or opposing legislation in behalf of a race or color, or advocating racial integration or segregation, or whose activities tend to cause racial conflicts or violence, or engaged in raising or expending funds for certain purposes in connection with litigation; to require the furnishing of certain information in connection therewith; to impose penalties for violations; to permit injunction in certain cases.

APPROVED SEPTEMBER 29, 1956

Be it enacted by the General Assembly of Virginia:

1. § 1. The continued harmonious relations be-

tween the races are hereby declared essential to the welfare, health and safety of the people of Virginia. It is contrary to the public policy of the State to permit those conditions to arise between the races which impede the peaceful coexistence of all peoples in the State and it is the duty of the government of the State to exercise all available means and every power at its command to prevent the same so as to protect its citizens from any dangers, perils and violence which would result from interracial tension and unrest and possible violations of Article 2 of Chapter 4 of Title 18 of the Code of Virginia. It is therefore further declared that it is vital to the public interest that information to the extent and in the manner hereinafter provided be obtained with respect to persons, firms, partnerships, corporations and associations whose activities are causing or may cause interracial tension and unrest.

§ 2. Every person, firm, partnership, corporation or association, whether by or through its agents, servants, employees, officers, or voluntary workers or associates, who or which engages as one of its principal functions or activities in the promoting or opposing in any manner the passage of legislation by the General Assembly in behalf of any race or color, or who or which has as one of its principal functions or activities the advocating of racial integration or segregation or whose activities cause or tend to cause racial conflicts or violence, or who or which is engaged or engages in raising or expending funds for the employment of counsel or payment of costs in connection with litigation in behalf of any race or color, in this State, shall, within sixty days after the effective date of this act and annually within sixty days following the first of each year thereafter, cause his or its name to be registered with the clerk of the State Corporation Commission, as hereinafter provided; provided that in the case of any person, firm, partnership, corporation, association or organization, whose activities have not been of such nature as to require it to register under this act, such person, firm, partnership, corporation, association or organization, within sixty days following the date on which he or it engages in any activity making registration under this act applicable, shall cause his or its name to be registered with the clerk of the State Corporation Commission, as hereinafter provided; and provided, further, that nothing herein shall apply to the right of the people peaceably to assemble and to petition the government for a redress of grievances, or to an individual freely speaking or publishing on his own behalf in the expression of his opinion and engaging in no other activity subject to the provisions hereof and not acting in concert with other persons.

§ 3. At the time of such registration, the following information as to the preceding twelve month period shall be furnished under oath and filed in such clerk's office:

If the registrant is an individual, firm or partnership, the home and each business address of such individual or member of the firm or partnership, the source or sources of any funds received or expended for the purposes set forth in § 2 of this act, including the name and address of each person, firm, partnership, association or corporation making any contribution, donation or gift for such purposes; and an itemized statement of expenditures for such purposes in detail.

If the registrant is a firm, partnership, corporation, association or organization, the business addresses of the principal and all branch offices of the registrant; the purpose or purposes for which such firm, partnership, corporation, association or organization was formed; if not already filed, a certified copy of the charter, articles of agreement or association, by-laws or other documents governing or regulating the operations of such firm, partnership, corporation or association; the names of the principal officers, the names and addresses of its agents, servants, employees, officers or voluntary workers or associates by or through which it carries on or intends to carry on the activities described in § 2 of this act in this State; a list of its stockholders or members in this State and their addresses; a financial statement showing the assets and liabilities of the registrant and the source or sources of its income, itemizing in detail any contributions, donations, gifts or other income, and from what source or sources received during the calendar year preceding such initial registration and each year thereafter; and a list of its expenditures in detail for the same period.

§ 4. The clerk of the State Corporation Commission shall prepare and keep in his office the files containing the information required by §§ 2 and 3. Such records shall be public records and shall be open to the inspection of any citizen at any time during the regular business hours of such office.

§ 5. (a) Any person, firm or partnership who or which engages in the activities described in § 2

of this act without first causing his or its name to be registered and information to be filed as herein required shall be guilty of a misdemeanor and punished accordingly.

(b) Any corporation, association or organization which shall engage in any activity described in § 2 of this act without first causing its name to be registered and information to be filed as herein required shall upon conviction be fined not exceeding ten thousand dollars.

(c) Any person, acting for himself or as agent or employee of any firm, partnership, corporation or association, who shall file any statement, certificate or report required by this act, knowing the same to be false or fraudulent, shall be guilty of a felony and punished as provided in §§ 18-238 and 18-239 of the Code.

(d) When any corporation or association, upon conviction of violation of the provisions of this act, has been sentenced to payment of a fine, and has failed to promptly pay the same, both the corporation or association and each officer and director and those persons responsible for the management or control of the affairs of such corporation or association may be held liable jointly and severally for such fine.

(e) Each day's failure to register and file the information required by § 2 shall constitute a separate offense and be punished as such.

§ 6. Any person, firm, partnership, corporation or association engaging in any activity described in § 2 of this act without complying with this act may be enjoined from continuing in any such activity by any court of competent jurisdiction.

§ 7. In any case in which a citizen files a statement with the Attorney General alleging on information and belief that a violation of this act has occurred and the particulars thereof are set forth, the Attorney General after investigation and a finding that the complaint is well founded shall institute proceedings in the Circuit Court of the City of Richmond for an injunction to restrain the violation complained of, and such court is hereby vested with jurisdiction to grant the same.

§ 8. If any one or more sections, clauses, sentences or parts of this act shall be adjudged invalid, such judgment shall not affect, impair or invalidate the remaining provisions thereof, but shall be confined in its operation to the specific provisions held invalid, and the inapplicability or invalidity of any section, clause or provision of this act in one or more instances or circumstances shall not be taken to affect or prejudice in any way its applicability or validity in any other instance.

§ 9. This act shall not apply to persons, firms, partnerships, corporations or associations who or which carry on such activity or business solely through the medium of newspapers, periodicals, magazines or other like means which are or may be admitted under United States postal regulations as second-class mail matter in the United States mails as defined in Title 39, § 224, United States Code Annotated, and/or through radio, television or facsimile broadcast or wire service operations. This act shall also not apply to any person, firm, partnership, corporation, association, organization or candidate in any political election campaign, or to any committee, association, organization or group of persons acting together because of activities connected with any political campaign.

ORGANIZATIONS
Legislative Investigation—Virginia

Chapter 37 of the 1956 Extra Session Acts of Virginia provides for the appointment of a joint committee of the General Assembly to investigate and hold hearings with respect to the activities of organizations and other associations "which seek to influence, encourage or promote litigation relating to racial activities" in the state.

CHAPTER 37

An Act to create a legislative committee of the House and Senate to investigate and hold hearings relative to the activities of corporations, associations, organizations and other groups which encourage and promote litigation relating to racial activities; to provide for the organization, powers and duties of said com-

mittee; to provide for hearings; to authorize said committee to issue subpoenas and require testimony; to provide for application to court for an order requiring any person to appear and testify who fails or refuses to do so; to provide for witness fees; to provide for employment of a clerical and investigative force by the committee; to provide for payment of expenses; to appropriate funds for use of the committee; to provide that the Attorney General or other legal counsel shall represent said committee; and for other purposes.

APPROVED SEPTEMBER 29, 1956

Be it enacted by the General Assembly of Virginia:

1. § 1. There is hereby created a Legislative Committee, to be composed of six members of the House appointed by the Speaker thereof, and four members of the Senate appointed by the President thereof.

§ 2. The Committee is authorized to make a thorough investigation of the activities of corporations, organizations, associations and other like groups which seek to influence, encourage or promote litigation relating to racial activities in this State. The Committee shall conduct its investigation so as to collect evidence and information which shall be necessary or useful in

(1) determining the need, or lack of need, for legislation which would assist in the investigation of such organizations, corporations and associations relative to the State income tax laws;

(2) determining the need, or lack of need, for legislation redefining the taxable status of such corporations, associations, organizations and other groups, as above referred to, and further defining the status of donations to such organizations or corporations from a taxation standpoint; and

(3) determining the effect which integration or the threat of integration could have on the operation of the public schools in the State or the general welfare of the State and whether the laws of barratry, champerty and maintenance are being violated in connection therewith.

§ 3. Said Committee may hold hearings anywhere in the State, and shall have authority to issue subpoenas, which may be served by any sheriff or city sergeant of this State, or any agent or investigator of the Committee, and his return shown thereon, requiring the attendance of witnesses and the production of papers, records and other documents. If any person, firm, corporation, association or organization which fails to appear in response to any such subpoena as therein required, or any person who fails or refuses, without legal cause, to answer any question propounded to him, then upon the application by the Chairman, or any member of the Committee acting at his direction, to the circuit or corporation court in the county or city wherein such person resides or may be found, such court shall issue an order directing such person to appear and testify. The Committee may, at its option, compel attendance of witnesses or production of documents by motion made before the circuit or corporation court having jurisdiction of the person or documents whose attendance or production is sought. The court upon such motion shall issue such subpoenas, writs, processes or orders as the court deems necessary. The Chairman of the Committee, or anyone acting at his direction, shall be authorized to administer oaths to all witnesses and to issue subpoenas. Every witness appearing pursuant to subpoena shall be entitled to receive, upon request, the same fee as is provided by law for witnesses in the courts of record in the State, and where the attendance of witnesses residing outside the county or city wherein the hearing is held is required, they shall be entitled to receive the sum of seven dollars after so appearing, upon certification thereof by the Chairman to the State Comptroller.

§ 4. Each member of the Committee shall receive, in addition to actual travel expenses, the same per diem as received by members of other legislative committees, while engaged in official duties as a member of said Committee.

§ 5. Said Committee shall be authorized to employ a clerical force and such investigators and other personnel as it may deem necessary to carry out the provisions of this act, and may expend moneys for the procuring of information from other sources.

§ 6. The Attorney General shall assist the Committee upon request, and the Committee may engage such other legal counsel as it shall deem necessary.

§ 7. The Committee shall complete its investigations and make its report, together with

any recommendations as to legislation, to the Governor and the General Assembly not later than November one, nineteen hundred fifty-seven.

2. There is hereby appropriated from the general fund of the State treasury the sum of twenty-five thousand dollars to carry out the purposes of this act.

ATTORNEYS
"Running and Capping"—Virginia

Chapter 33 of the 1956 Extra Session Acts of Virginia amends the Virginia Code with respect to the licensing and suspension of attorneys. The act defines a "runner" or "capper" as one who acts as an agent for an attorney for the purpose of soliciting business and regulates such persons.

CHAPTER 33

An Act to amend and reenact §§ 54-74, 54-78 and 54-79 of the Code of Virginia, relating, respectively, to procedure for suspension and revocation of licenses of attorneys at law, and to running and capping.

APPROVED SEPTEMBER 29, 1956

Be it enacted by the General Assembly of Virginia:

1. That §§ 54-74, 54-78 and 54-79 of the Code of Virginia be amended and reenacted as follows:

§ 54-74. (1) Issuance of rule.—If the Supreme Court of Appeals, or any court of record of this State, observes, or if complaint, verified by affidavit, be made by any person to such court of any malpractice or of any unlawful or dishonest or unworthy or corrupt or unprofessional conduct on the part of any attorney, or that any person practicing law is not duly licensed to practice in this State, such court shall, if it deems the case a proper one for such action, issue a rule against such attorney or other person to show cause why his license to practice law shall not be revoked or suspended.

(2) Judges hearing case.—At the time such rule is issued the court issuing the same shall certify the fact of such issuance and the time and place of the hearing thereon, to the chief justice of the Supreme Court of Appeals, who shall designate two judges, other than the judge of the court issuing the rule, of circuit courts or courts of record of cities of the first class to hear and decide the case in conjunction with the judge issuing the rule, which such two judges shall receive as compensation ten dollars per day and necessary expenses while actually engaged in the performance of their duties, to be paid out of the treasury of the county or city in which such court is held.

(3) Duty of Commonwealth's attorney.—It shall be the duty of the attorney for the Commonwealth for the county or city in which such case is pending to appear at the hearing and prosecute the case.

(4) Action of court.—Upon the hearing, if the defendant be found guilty by the court, his license to practice law in this State shall be revoked, or suspended for such time as the court may prescribe; provided, that the court, in lieu of revocation or suspension, may, in its discretion, reprimand such attorney.

(5) Appeal.—The person or persons making the complaint or the defendant, may, as of right, appeal from the judgment of the court to the Supreme Court of Appeals by petition based upon a true transcript of the record, which shall be made up and certified as in actions at law.

(6) "Any malpractice, or any unlawful or dishonest or unworthy or corrupt or unprofessional conduct", as used in this section, shall be construed to include the improper solicitation of any legal or professional business or employment, either directly or indirectly, *or the acceptance of employment, retainer, compensation or costs from any person, partnership, corporation, organization or association with knowledge that such person, partnership, corporation, organization or association has violated any provision of Article 7 of this chapter,* or the failure, without sufficient cause, within a reasonable time after

demand, of any attorney at law, to pay over and deliver to the person entitled thereto, any money, security or other property, which has come into his hands as such attorney; *provided, however, that nothing contained in this Article shall be construed to in any way prohibit any attorney from accepting employment to defend any person, partnership, corporation, organization or association accused of violating the provisions of Article 7 of this chapter.*

(7) Representation by counsel.—In any proceedings to revoke or suspend the license of an attorney under this or the preceding section, the defendant shall be entitled to representation by counsel.

§ 54-78. As used in this article:

(1) A "runner" or "capper" is any person, corporation, partnership or association acting in any manner or in any capacity as an agent for an attorney at law within this State *or for any person, partnership, corporation, organization or association which employs, retains or compensates any attorney at law in connection with any judicial proceeding in which such person, partnership, corporation, organization or association is not a party and in which it has no pecuniary right or liability,* in the solicitation or procurement of business for such attorney at law * *or for such person, partnership, corporation, organization or association in connection with any judicial proceedings for which such attorney or such person, partnership, corporation, organization or association is employed, retained or compensated.*

The fact that any person, partnership, corporation, organization or association is a party to any judicial proceeding shall not authorize any runner or capper to solicit or procure business for such person, partnership, corporation, organization or association or any attorney at law employed, retained or compensated by such person, partnership, corporation, organization or association.

(2) An "agent" is one who represents another in dealing with a third person or persons.

§ 54-79. It shall be unlawful for any person, corporation, partnership or association to act as a runner or capper * *as defined in* § 54-78 to solicit any business for * *an attorney at law or such person, partnership, corporation, organization or association,* in and about the State prisons, county jails, city jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, police courts, * *county* courts, municipal courts, * courts *of record,* or in any public institution or in any public place or upon any public street or highway or in and about private hospitals, sanitariums or in and about any private institution or upon private property of any character whatsoever.

2. An emergency exists and this act is in force from its passage.

EMPLOYMENT

Fair Employment Laws—California

The city of Bakersfield, California, adopted a "fair employment practices" ordinance on September 3, 1957. The ordinance, No. 1146 n.s., provides for the appointment of a Commission on Equal Employment Opportunity, defines and prohibits discrimination on the basis of race, color, religion or other factors in employment, and provides for enforcement procedures.

ORDINANCE NO. 1146, NEW SERIES

AN ORDINANCE prohibiting discriminatory practices in employment because of race, color, religion, ancestry, national origin, or place of birth by employers, employment agencies, labor organizations and others: creating a commission on equal employment opportunity, and prescribing its duties and powers generally; and providing penalties for the violation of this ordinance.

BE IT ORDAINED by the Council of the City of Bakersfield, as follows:

SECTION I

Findings. It is the desire of the Council of the City of Bakersfield to promote the public

welfare of all the citizens of said City regardless of race, religion, color, ancestry, national origin or place of birth, by encouraging equal employment opportunity to all citizens, and to lessen and prevent discrimination against anyone on the grounds herein mentioned, by preventing or prohibiting such discrimination wherever possible, thereby encouraging all citizens to reach the full development of their individual potentialities and to provide adequately toward the economic security of their families and the education of their children and to make their contribution to the industrial, business and civic life of this City.

And it is the conclusion of this Council that discrimination in employment by reason of race, color, religion, ancestry, national origin or place of birth tends to impose substantial financial burdens upon the public revenues which must be used for the relief and amelioration of the condition of those affected by such discrimination wherever it exists, and that by encouraging widespread employment among all persons willing to work, such will tend to lessen disease, delinquency and crime when due to poverty or lack of employment.

SECTION 2

Declaration of Policy. It is hereby declared that every inhabitant of this City has the right to equal employment opportunity without being subjected to discrimination because of race, religion, color, ancestry, national origin or place of birth.

SECTION 3

Scope of Ordinance. This ordinance applies to employment practices within the territorial limits of this City and to the hiring of persons elsewhere for work to be performed within the City where such hiring outside of the City is for the purpose of evading the provisions and requirements of this ordinance.

SECTION 4

Definitions. (a) The term "person" wherever used in this ordinance means and includes any individual, partnership, corporation, labor organization, or other association, including those acting in a fiduciary or representative capacity whether appointed by a court or otherwise. The term "person" as applied to partnerships, labor organizations, or other associations includes their members and as applied to corporations includes their officers.

(b) The term "employer" wherever used in this ordinance means and includes the City, and

1. All departments, officers, agents or employees of the City and its instrumentalities.

2. All contractors and their subcontractors engaged in the performance of any contract entered into with this City or any of its contracting agencies; and

3. All private employers having five (5) or more employees in this City exclusive of the parents, spouse, or children of such employer, or his domestic servants. The term "employer", however, shall not include religious or social corporations or associations not organized or operated for private profit.

(c) The term "labor organization" wherever used in this ordinance means and includes any organization in this City which exists for the purpose in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in relation to employment.

(d) The term "employment agency" wherever used in this ordinance means and includes any person engaging in business or regularly undertaking in this City, with or without compensation, to procure opportunities for employment or to procure, recruit, refer or place employees.

(e) The term "employment" wherever used in this ordinance does not apply to the employment of individuals to serve as domestic servants nor to the employment of individuals by religious or social corporations or associations not organized or operated for private profit.

(f) The term "discrimination" includes but is not limited to "segregation."

(g) The term "commission" means the City of Bakersfield Commission on Equal Employment Opportunity.

SECTION 5

Unlawful Employment Practices. It shall be an unlawful employment practice, except where based upon applicable security regulations established by the United States, by the State of California, or by the City of Bakersfield:

(a) For any employer to refuse to hire any individual or to otherwise discriminate against any individual with respect to hiring, tenure, compensation, promotion, discharge or any other

terms, conditions or benefits of employment because of race, color, religion, ancestry, national origin or place of birth;

A determination or choice by the employer based upon standards or criteria uniformly, fairly and impartially applied to all applicants or persons considered shall not constitute a violation of this ordinance.

If the employer in fact makes occupational qualifications the basis of his determination, proof of discrimination must include proof that complainant is better qualified than the individual selected, promoted or retained.

(b) (1) For any employer, employment agency, or labor organization to use any form of application for employment or membership containing questions or entries regarding race, color, religion, ancestry, or national origin;

(2) For any employer, employment agency or labor organization to require of any applicant for employment or membership any information concerning race, color, religion, ancestry or national origin;

(3) It shall be permissible and lawful for an employer, subsequent to the employment of any individual, to require, secure and record any such information concerning an employee, including a photograph of such employee, if such inquiries are reasonably necessary to the operation of the employer's firm or business and such information is not used for the purpose of violating this ordinance. The right to require, secure and record such information shall be subject to the power of the Commission to impose limitations thereon in appropriate cases.

(c) It shall be permissible and lawful, however, for a prospective employer of any individual or groups of individuals, to require and secure a photograph, sketch or moving picture of such prospective employee or employees, when any hiring is to be done without personal interview and the nature of the employment depends mainly upon physical appearance, personality, demeanor and manner, or ability of such prospective employee or employees to make personal public appearances for entertainment or lecture purposes, whether on stage, television or by other visual means.

(d) For any employer, employment agency or labor organization to announce any policy or to cause to be published or circulated any notice, information, or advertisement relating to employment or membership which indicates any preference, limitation, specification, or discrimination because of race, color, religion, ancestry, national origin or place of birth;

(e) For any employment agency to fail or refuse to classify properly or refer for employment or otherwise discriminate against any individual because of race, color, religion, ancestry, national origin or place of birth.

(f) For any labor organization to discriminate against any individual in any way which would prevent his acquiring, or would terminate or limit, or otherwise adversely affect his union membership or his employment opportunities including his status as an applicant, his tenure, compensation, promotion, discharge or any other terms, conditions or privileges related to employment because of race, color, religion, ancestry, national origin or place of birth;

(g) For any employer, employment agency or labor organization to discriminate against any individual because he has lawfully opposed any practice forbidden by this ordinance or because he had made a complaint or testified or assisted in any manner in any investigation or proceeding under this ordinance.

(h) For any person to obstruct or prevent any person from complying with the provisions of this ordinance or any order issued thereunder or to attempt to commit or cause to be committed any act declared by this ordinance to be an unlawful employment practice.

The burden of proving the existence of an unlawful employment practice shall be on the party holding the affirmative of the issue as required by Section 1981 of the Code of Civil Procedure of the State of California. In cases of alleged discrimination against individuals, evidence of a pattern of employment or quota system in existence subsequent to the effective date of this ordinance shall be admissible.

None of the acts made unlawful by subsections (a) through (h) of this section shall be unlawful employment practices if the employment, membership, or service in question by its unique nature requires classifications which include any of the forbidden criteria. The burden of proof shall be upon the person asserting the unique nature of the employment, membership or service to establish such fact.

No employer shall be liable for any discrimination practiced by a labor organization unless such employer participates in or cooperates with such acts of discrimination by such labor organization. The fact that the employer agrees to secure all new employees from a labor organi-

zation or agrees to give the labor organization an opportunity to fill vacancies in employment or the fact that the employer agrees with the labor organization to recognize prior rights to employment based on seniority or previous employment in the industry does not, of itself, constitute participation or cooperation by the employer in any discrimination practiced by the labor organization.

No labor organization shall be liable for any discrimination practiced by an employer unless such labor organization participates in and cooperates with such acts of discrimination by such employer. The fact that the labor organization agrees to provide all new employees for an employer or that there is an agreement which gives the labor organization an opportunity to fill vacancies in employment or the fact that the labor organization recognizes prior rights to employment based on seniority or previous employment in the industry does not of itself constitute participation or cooperation by the labor organization with the employer in any discrimination practiced by the employer, provided these seniority rights are applied equally by the labor organization to all members on a uniform non-discriminatory basis.

Notwithstanding any other provision of this ordinance, it shall be an unlawful employment practice for any employer, employment agency, or labor organization to require citizenship or residence qualifications, or both, as a condition of employment, membership, or service on a uniform, non-discriminatory basis.

SECTION 6

Commission on Equal Employment Opportunity. (a) The City of Bakersfield Commission on Equal Employment Opportunity shall serve without pay and shall consist of seven (7) members to be appointed by the Mayor with the approval of the City Council. Two (2) of the members who are first appointed shall be designated to serve for terms of one (1) year, two (2) for two (2) years, two (2) for three (3) years and one for four (4) years from the date of their appointments. Thereafter, members shall be appointed as aforesaid for a term of office of four (4) years, except that all of the vacancies occurring during a term shall be filled for the unexpired term. A member shall hold office until his successor has been appointed and has qualified. The Mayor shall designate which of the members of the Commission appointed shall be the first chairman, but when the office of the chairman of the Commission become vacant thereafter the Commission shall elect a chairman from among its members. The term of office as chairman of the Commission shall be for the calendar year or for that portion thereof remaining after each such chairman is designated or elected. Any member of the Commission may be removed by the Mayor upon notice and hearing before the City Council assembled for such purpose, for neglect of duty or for malfeasance in office but for no other cause. Any such determination shall be by the affirmative vote of four (4) members of said Council.

It shall constitute malfeasance in office for any Commissioner to divulge or reveal to any person, except the parties to the proceedings, members of the Commission and its staff, any evidence or information obtained in any proceedings pursuant to Section 8 (b) hereof.

It shall constitute malfeasance in office for any Commissioner to divulge or reveal to any person, except the parties to the proceedings, members of the Commission and its staff or the City Attorney under and pursuant to Section 9 hereof, any evidence or information obtained in any proceedings pursuant to Section 8 (c) hereof.

(b) The Commission shall submit to the City Council an estimate of the necessary expenses for its operation during the ensuing fiscal year, and said Council shall in its discretion appropriate such sums as it may deem necessary for such purpose.

Any employee of the Commission or of the City assigned to work with the Commission who shall divulge or reveal to any person other than parties to the proceedings, members of the Commission and its staff any evidence or information obtained under or pursuant to Section 8 (b) hereof, shall be subject to dismissal for insubordination.

Any employee of the Commission or of the City assigned to work with the Commission who shall divulge or reveal any evidence or information obtained under Section 8 (c) hereof to any person, except to parties to the proceedings, members of the Commission and its staff and the City Attorney, under and pursuant to Section 9 hereof, shall be subject to dismissal for insubordination.

SECTION 7

Powers and Duties. The Commission on Equal Employment Opportunity shall:

(a) Formulate plans of education to promote fair employment practices by persons subject to this ordinance.

(b) Make technical studies and prepare and disseminate educational material relating to discrimination and ways and means of eliminating it.

(c) Confer, co-operate with, and furnish technical assistance to persons subject to this ordinance in formulating educational programs for elimination of discrimination.

(d) Receive, investigate and seek to adjust all complaints of discrimination as herein provided.

(e) Make specific and detailed recommendations to the interested parties as to the method of eliminating discrimination.

(f) Render to the Mayor from time to time, or upon request, but not less than annually, a report of its activities.

(g) Make and publish reports of case histories of conciliation settlements made under this ordinance which in its judgment will effectuate the purposes of this ordinance. Reports of case histories of conciliation settlements shall not, unless the consent of the parties is first obtained, include names or other facts which might clearly identify the parties; but it shall be mandatory to publish representative case histories from time to time for the guidance and education of the public.

(h) Initiate complaints as provided in Section 8 (a) hereof.

(i) Refer unsettled complaints to the City Attorney as provided in Section 9 hereof.

SECTION 8

Adjustment and Settlement of Complaints. (a) All complaints before the Commission shall be written, signed, properly verified and filed by the individual who alleges discrimination against him within sixty (60) days after the alleged discriminatory act is committed, except that complaints alleging violations of Section 5 (b) (1), (d), (g) and (h) hereof may be initiated by the Commission itself within sixty (60) days after the alleged discriminatory act is committed. A copy of such complaint shall be furnished to the person charged at the time of filing. Such complaint shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful employment practice complained of and shall set forth the particulars thereof and contain such other information as may be required by the rules and regulations of the Commission.

Any employer whose employees, or some of whose employees, obstruct or prevent any person from complying with the provisions of this ordinance, or attempt to do so, may file with the Commission a verified complaint asking assistance by conciliation or remedial action.

(b) Upon the filing of any complaint a member of the Commission shall make a full and prompt investigation in connection therewith. In such case the Commissioner may utilize the services of a staff assistant or of a person assigned by the City Manager to work with the Commission. If, upon such investigation the Commissioner shall find that the person charged in the complaint has not engaged in or is not engaging in any unlawful employment practice, the complaint shall be dismissed.

If the Commissioner shall determine after such investigation that probable cause exists for the allegations made in the complaint, he shall endeavor to eliminate the unlawful employment practice charged in the complaint by means of conciliation and persuasion. Within the limits set forth in Section 9 (c) the Commissioner may recommend such affirmative action as the case may require.

(c) In case of failure to eliminate the unlawful employment practice by the means provided in Section 8 (b), a quorum of the commission shall convene for the purpose of reviewing the matter and shall, by conciliation and mediation, endeavor to eliminate the discrimination charged. Such proceedings shall be private. In furtherance of such conciliation and mediation the Commission may make spcific recommendations to the parties but such recommendations shall not constitute a decision, finding of fact, judgment or order of the Commission, or be binding upon, or be admissible in any court in any subsequent proceedings under Section 9 hereof. Within the limits set forth in Section 9 (c) the Commission may recommend such affirmative action as the case may require.

(d) In the performance of its duties under the provisions of Section 8 (c) of this ordinance, the Commission, by majority vote, may require by subpoena the attendance of any person and/or the production of any relevant papers,

documents or records under his control which are relevant and reasonably necessary to the inquiry. The Commission shall have no other power of subpoena. Disobedience to any subpoena issued by the Commission under this ordinance shall constitute a misdemeanor.

(e) All evidence and information given to or obtained by the Commission in any proceedings under the provisions of Section 8 (b) hereof, shall be confidential and no such evidence or information shall be divulged or revealed by any member of the Commission or its staff or by any employee of the Commission, or of the City assigned to work with the Commission, or by the complainant, to any person other than parties to the proceedings, members of the Commission and its staff or used against any person at any time by any member or employee of the Commission.

All evidence and information given to, or obtained by the Commission in any proceedings under the provisions of Section 8 (c) hereof shall be confidential and no such evidence or information shall be divulged or revealed to any person except to parties to the proceedings, members of the Commission and its staff, and the City Attorney in cases arising under the provisions of Section 9 hereof. Any breach of the above prohibition by complainant shall, in the discretion of the Commission, be grounds for dismissal of any proceedings then pending of behalf of said complainant.

The voluntary giving or furnishing of any information or evidence to the Commission in any proceedings under the provisions of Section 8 (b) hereof shall not constitute a waiver of any legal or constitutional privileges or defenses.

(f) If the parties accept the recommendations of the Commission the matter shall be deemed settled and terminated and no other proceedings shall be had or taken.

(g) Whenever the Commission determines that any officer, agent or employee of the City has engaged or is engaging in an unlawful employment practice it shall recommend appropriate action to the Mayor.

SECTION 9

Court Proceedings. (a) If the Commission is unable to eliminate the discrimination charged, the Commission may, by a majority vote of all members certify the matter to the City Attorney for appropriate legal action to secure compliance with the provisions of this ordinance.

The Commission shall, at the time of certifying said matter, transmit to the City Attorney a copy of its recommendations in such case.

The City Attorney shall proceed in the name of the City, no less than twenty (20) and no more than forty (40) days thereafter, to invoke the aid of an appropriate court to secure compliance with the provisions of this ordinance. If the Commission prior to the commencement of the court proceedings as a result of its effort of adjustment or otherwise finds that the defendant is no longer engaging in unlawful employment practices and has complied with the recommendations of the Commission, no such proceedings shall be instituted.

(b) In any court proceedings instituted by the City Attorney the court shall hear and consider the matter as if it had never been before the Commission, and there shall be no presumptions in favor of any prior action of the Commission, nor shall there be any presumption against a defendant arising out of his refusal to accept or comply with any recommendation of the Commission. In such cases the burden of proof shall be upon the City to establish by competent and substantial evidence that the defendant has violated the ordinance.

(c) No person shall be liable in damages or for any monetary judgment in excess of a sum equal to ninety (90) days' back pay, wages or earnings of the individual discriminated against. It shall be the duty of any individual discriminated against to minimize his loss or damage by attempting to secure other suitable employment, and the liability of the employer, labor organization or employment agency shall be reduced to the extent such individual has failed to minimize his damage.

(d) In every court proceeding instituted by the City Attorney to secure compliance with this ordinance, the defendant shall be entitled to a jury trial on the issue of damages or back pay, but the court, without a jury may make all other equitable orders pertaining to all other issues.

(e) Any employer who employs any individual pursuant to any formal or informal recommendation of the Commission, or pursuant to any order of the court rendered hereunder, may make adjustments in his work force so that such employment does not increase the number of his employees or require him to employ more persons than necessary.

SECTION 10

City Contracts. In the event that two or more adverse court decisions are rendered in cases originating within a period of one (1) year whereby any employer, labor organization or employment agency is found by the court to have violated the provisions of this ordinance and where such employer, labor organization or employment agency has been guilty of deliberate, wilful and persistent violations of this ordinance, the Commission shall after securing declaratory relief as hereinafter set forth certify such finding to the Mayor, whereupon the Mayor shall order all departments of this City not to enter into any contract with such employer, labor organization or employment agency for a period of one (1) year.

Before making such a finding the Commission by appropriate action for declaratory relief brought in the name of the City of Bakersfield by the City Attorney must obtain from the Superior Court a declaration that such employer, labor organization or employment agency has been guilty of such deliberate, wilful and persistent violations of this ordinance as to entitle the Commission to certify such findings to the Mayor.

SECTION II

No Duplication of Remedies. The rights and remedies herein granted by the provisions of this ordinance to a person aggrieved are deemed to be entirely adequate and this ordinance and the provisions thereof shall not be construed as granting to an aggrieved individual any right to pursue a civil action in addition to, or in place of, the remedies enumerated in this ordinance.

SECTION 12

Severability. The provisions of this ordinance are severable and if any provision, sentence, clause, section or part thereof is held illegal, invalid or unconstitutional or inapplicable to any person or circumstance, such illegality, invalidity, unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of the ordinance or their application to other persons and circumstances. It is hereby to be the legislative intent that this ordinance would have been adopted if such illegal, invalid or unconstitutional provision, sentence, clause, section or part had not been included therein, and if the person or circumstances to which the ordinance or any part thereof is inapplicable had been specifically exempted therefrom.

SECTION 13

Repeal. Any ordinance or part of any ordinance conflicting with the provisions of this ordinance be and the same is hereby repealed so far as the same affects this ordinance.

SECTION 14

This ordinance shall be effective thirty days from and after the date of its passage.

I HEREBY CERTIFY that the foregoing Ordinance was passed and adopted by the Council of the City of Bakersfield at a regular meeting thereof held on the 3rd day of September, 1957, by the following vote:

AYES: Balfanz, Carnakis, Collins, Croes, Dewire, Doolin.
Noes: None.
ABSENT: Bentley.

(SEAL) MARIAN S. IRVIN,

City Clerk and Ex-Officio Clerk of the Council of the City of Bakersfield.

APPROVED this 3rd day of September, 1957.

FRANK SULLIVAN,
MAYOR of the City of Bakersfield.

HOUSING
Publicly Assisted Housing—New Jersey

Chapter 66 of the New Jersey Public Laws of 1957, enacted June 4, 1957, amends that state's Law Against Discrimination so as to include "publicly assisted housing accommoda-

tions" among the places or accommodations at which discrimination on the basis of race, creed, color, national origin or ancestry is prohibited. Material in the amendatory act printed in *italics* is new and material included within brackets is to be omitted.

STATEMENT

The purpose of this bill is to prohibit discrimination in obtaining the accommodations, advantages, facilities and privileges in any publicly assisted housing accommodation because of race, creed, color, national origin or ancestry; and further, to define a publicly assisted housing accommodation.

AN ACT to ammend the "Law Against Discrimination," approved April 16, 1945

(P. L. 1945, c. 169).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 4 of the act of which this act is amendatory is amended to read as follows:

4. All persons shall have the opportunity to obtain employment [and], to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation *and publicly assisted housing accommodation*, without discrimination because of race, creed, color, national origin or ancestry, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

2. Section 5 of the act of which this act is amendatory is amended to read as follows:

5. As used in this act, unless a different meaning clearly appears from the context:

a. "Person" includes 1 or more individuals, partnerships, associations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and fiduciaries.

b. "Employment agency" includes any person undertaking to procure employees or opportunities for others to work.

c. "Labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in connection with employment.

d. "Unlawful employment practice" and "unlawful discrimination" includes only those unlawful practices and acts specified in section 11 of this act.

e. "Employer" does not include a club exclusively social or a fraternal, charitable, educational or religious association or corporation, if such club, association or corporation is not organized and operated for private profit, nor does it include any employer with fewer than 6 persons in his employ.

f. "Employee" does not include any individual employed by his parents, spouse or child, or in the domestic service of any person.

ff. "Liability for service in the Armed Forces of the United States" means subject to being ordered as an individual or member of an organized unit, into active service in the Armed Forces of the United States by reason of membership in the National Guard, naval militia or a reserve component of the Armed Forces of the United States or subject to being inducted into such Armed Forces through a system of national selective service.

g. "Division" means the State "Division Against Discrimination" created by this act.

h. "Commissioner" means the State Commissioner of Education.

i. "Commission" means the Commission on Civil Rights created by this act.

j. "A place of public accommodation" shall include any tavern, roadhouse, or hotel, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any retail shop or store; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, and stations and terminals thereof; any public bathhouse, public boardwalk, public seashore accommodation; any auditorium, meeting place, or public hall; any theatre, or other place of public amusement, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billard and pool parlor; any

comfort station; any dispensary, clinic or hospital; and any public library, any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to, any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post-secondary school from using in good faith criteria other than race, creed, color, national origin or ancestry, in the admission of students.

k. "A publicly assisted housing accommodation" shall include all housing built with public funds or public assistance pursuant to chapter 300 of the laws of 1949, chapter 213 of the laws of 1941, chapter 169 of the laws of 1944, chapter 303 of the laws of 1949, chapter 19 of the laws of 1938, chapter 20 of the laws of 1938, chapter 52 of the laws of 1946, and chapter 184 of the laws of 1949, and all housing financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof.

3. This act shall take effect immediately.

ADMINISTRATIVE AGENCIES

EDUCATION
Public Schools—Arkansas

The plan of the North Little Rock, Arkansas, Board of Education for the racial integration of its school system was adopted in July, 1955. The plan provided for the gradual integration of the schools, beginning with the 12th grade "within two years." On September 3, 1957, following the ordering of the National Guard to prevent the admission of Negro pupils to previously "white" schools in Little Rock by the governor of Arkansas, the board decided to suspend the putting into effect of its plan. A statement of the plan adopted and of the suspension of the plan follow:

PLAN FOR INTEGRATION IN
NORTH LITTLE ROCK SPECIAL SCHOOL DISTRICT
BEGINNING SEPTEMBER 1957

Long before the Supreme Court Decision of May 17, 1954, the Board of Education had taken positive steps to remove inequities in the overall education program of the North Little Rock Special School District. This was accomplished through a building program involving all aspects of the District's housing facilities due to the steadily increasing school population. Along with this development were other joint activities whereby all members of the professional staff shared, and shared alike in salary schedule, in staff meetings, and in professional and instructional meetings. All of these developments came about without any pressure and without any knowledge of the coming decision from the Supreme Court. Therefore, there is much evidence to indicate a permissive attitude on the part of the Board of Education and its entire staff in matters dealing with all its people.

Following the decision of May 17, 1954, the North Little Rock Board of Education first considered this matter in a special meeting held at noon, September 3, 1954, in the Senior High Cafeteria. At this meeting, the position taken by the Board was to continue to operate the North Little Rock Schools under the laws prescribed by the State of Arkansas, and that the attendance areas remain the same. After this decision was stated by the Board a hearing was requested by a group of Negro parents, who were represented by the NAACP. This hearing was held in the School Board Office, September 28, 1954. A complete transcription of this meeting is a part of the minutes of the Board. The parties present were heard, after which the meeting adjourned. No action was taken.

In July of 1955, a request for a hearing by *"White America"* was made to the Board which was granted at the regular meeting on July 14th. After hearing the groups present and concluding a rather lengthy business session, the Board stated and approved its policy on integration which is simple and brief. This policy simply states that integration will start in North Little Rock Special School District within the next two years at the high school level beginning with the 12th grade. This is interpreted to mean that integration may start in the 12th grade, at Senior High School, at the opening of school in September 1957.

To implement the action of the Board the following statements and regulations shall be used as a guide and carefully adhered to in all matters pertaining to the Board's policy on integration:

I. The eligibility of a student of the 12th grade to attend either high school will be determined by the attendance area in which the student resides.

II. A student who has regularly attended either high school starting as a 10th grade student would be expected to continue in that school unless residence in a particular attendance area establishes eligibility to consider a transfer.

III. The attendance area for North Little Rock High School at 22nd and Main shall be all territory west of Main Street and north of 27th Street extended eastward until the district boundary is intersected. This attendance area applies only to students of the 12th grade.

IV. The attendance area for Scipio A. Jones High School at 10th and Walnut shall be all territory east of Main Street and south of 27th Street, extended eastward until the district boundary is intersected. This attendance area applies only to students of the 12th grade.

V. After August 1, 1957, any resident student * who has successfully completed the 11th grade, and has earned not less than twelve units of high school work as recognized by the State Department of Education and the North Central Association of Secondary Schools and Colleges may present himself or herself at the Principal's office for registration and enrollment.

*Note: Resident student is that student who not only qualifies as stated above but whose parents are legal residents of North Little Rock Special School District. Students cannot live with a relative or friend and qualify. The legal residence of parents determine whether student is a resident student.

VI. If a student has enrolled or is eligible to enroll in a school in which his or her race is in a minority and later decides to transfer to the school where his or her race is in the majority, this transfer will be permitted. Such transfers will be permitted at any time but it is strongly urged that it should be done in the first six weeks of school. Promiscuous transferring will not be permitted. Once a student has made such a transfer, he or she will be expected to remain at the school of second choice.

VII. The decision to enroll in either school must be made in line with good scheduling procedures and at the time open for such enrollment. An eligible student must show good faith in making a choice of which school to attend and this choice should be made in ample time before or by the announced dates of registration, so that a suitable schedule may be worked out by the principal, guidance counselor, or other person designated by the principal for this work.

VIII. The Board of Education reserves the right to review the results of this policy after one year's operation before determining whether it will be extended to the 11th grade.

* * *

NORTH LITTLE ROCK SPECIAL SCHOOL DISTRICT

North Little Rock, Arkansas

September 3, 1957

The immediate developments dealing with the problem of integration, particularly the action taken by Governor Orval Faubus, makes it imperative that the Board of Education of the North Little Rock Special School District reconsider its announced plan for integration at North Little Rock Senior High School on September 9, 1957.

The uncertainty and confusion which now surrounds any plan which the Board may attempt to implement at this time is so great that the Board deems it necessary to forego, indefinitely, its present plan for integration.

The Board has made every effort to *keep good faith* in its announced intentions and feels that this move is not a breach of faith but rather a recognition of the reality of present conditions in the face of which it would not be wise to persist. Furthermore, the Board is unwilling to accept the full responsibility for what might happen until it has complete assurance that compliance with the Supreme Court Decision of May 17, 1954 may be done orderly and peaceably. The Board is, further, unwilling to risk the disturbance to the schools as now seems evident.

Therefore, in Special Session, September 3, 1957, at 7:00 P. M., at the School Board Office, 28th and Poplar, North Little Rock, it is the action of the Board to postpone its plan of integration indefinitely and that no further move be made in this direction until the status of the problem of integration has been fully cleared by the Courts.

EDUCATION
Public Schools—Arkansas

See the progress report of integration submitted by the Van Buren, Arkansas, school board, *supra*, at p. 965.

EDUCATION
Public Schools—New York

Following the initial decision of the United States Supreme Court in the *School Segregation Cases* the Board of Education of the City of New York adopted a resolution calling for the appointment of a Commission on Integration to study and report factors affecting the attainment of an announced goal of "racially integrated schools." A prime consideration of the Board was the abolition of "de facto" segregation arising from racial residential patterns. Within the Commission subcommissions on (1) Zoning, (2) Educational Standards and Curriculum, (3) Guidance, Educational Stimulation and Placement, (4) Teacher Assignment and Personnel, (5) Community Relations and Information, (6) Physical Plant and Maintenance, and (7) Liaison were appointed. Reports of some of these subcommissions have been made and adopted by the Board. The report of the subcommission on Zoning, approved by the full commission on December 14, 1956 is set out at 2 Race Rel. L. Rep. 231. See also, 2 Race Rel. L. Rep. 507. Following the adoption of that report, the Superintendent of Schools of the city in July, 1957, prepared a zoning plan. The plan, referred to as "tentative," is set out below.

Any comprehensive plan for zoning will be the result of a process of growth and, therefore, no doubt will undergo continuous modification. Any plan at present is, therefore, to be regarded as a starting point and, of necessity, will be flexible.

Since there is an uneven distribution of various ethnic groups in different communities and boroughs, and since there is a constant shift of population within the city, it is impossible to establish any fixed ratio of children of different racial backgrounds for all schools. The ratio will vary among schools and will constantly change as the residential pattern shifts from one majority to another. The homogenous character of some school neighborhoods is an effect of segregated residential patterns, a condition which the schools cannot deal with directly.

Unfortunately, there are in New York City a few localities populated by Negroes which cover so large an area that it is difficult to provide an inter-racial population for those schools located in the heart of such areas. Nevertheless, the assistant superintendent should constantly keep this objective in mind. At the same time, he should take appropriate steps to develop within his districts an understanding of, and positive attitude toward, more inter-racial schools as part of a good intergroup relations program.

ELEMENTARY AND JUNIOR HIGH SCHOOLS

Definition—By zoning is meant the process of establishing boundary lines for an area within which all pupils of the same grade attend the same school.

I. Basic Criteria

1. *Distance from home to school*—This means that the proximity of the school to the homes of the children who attend it is a major consideration in deciding on the boundary lines. This is particularly true of the elementary schools. A half-mile is considered beyond walking distance for pupils in the kindergarten through second grade, a mile for pupils in the third grade through the eighth grade.

2. *Maximum utilization of school space*—In the face of mounting enrollments, it is necessary to adjust zone lines to make the most efficient use of existing school facilities.

3. *Racially integrated schools*—In applying the above criteria, the promotion of a racially integrated school population should be an important consideration.

4. *Transportation*—Where it is necessary for children to use public transportation, the convenience and accessibility of such transportation is a factor in setting zone lines. In instances where children are assigned to schools beyond the distance limits mentioned in Item 1, transportation by various means, including the school bus, is provided.

5. *Topographical barriers*—Lakes, rivers, canals, railroads, street crossings, bridges, parks, highways and other natural and man-made obstacles are factors which often have an intruding influence with respect to school zoning.

6. *Continuity of instruction*—It is an objective to avoid shifting the same pupils several times as a result of adjustments in school boundaries.

II. Basic Principles

1. The neighborhood school concept post is that the public elementary and junior high school are essentially neighborhood or community institutions which serve the children of families living within an area contiguous to the school building. It may be possible, without abandoning the neighborhood school concept, so to draw the zone lines that more pupils of different races will attend schools with inter-racial pupil groups.

The application of the neighborhood school concept insures the conditions of relative nearness, safety and convenience which are basic considerations of good school organization. Many parents still want their children to come home for lunch. If a child becomes ill, he is not far from home. If a child takes private lessons after school, he can get home quickly. If he goes to released time instruction, he will be near the center. If he wants to remain in school for some special activity, he can get home without being required to meet a bus schedule. The neighborhood school also tends to develop a strong parents' association and a stronger community spirit.

The determination of district lines should be consistent with the neighborhood school concept and the district of the school unit should be the attendance area of all pupils living within it.

2. The Assistant Superintendent shall have the responsibility for determining school district lines. This responsibility is logically placed on the Assistant Superintendent in the field as the person having direct supervision of the schools, a comprehensive knowledge of the area, full information on available school facilities and instructional needs, and immediate contact with members of the Local School Boards and community.

The Assistant Superintendent should weigh the advantages of a complete introduction of a boundary change as against its gradual introduction by having it apply only to new admissions. One factor might be the degree of difficulty in winning over the community to the change.

3. Parents of pupils affected and members of the Local School Boards should be consulted by the Assistant Superintendent prior to making changes in existing school districts or in creating new school districts.

4. Provision should be made in each school for classes which will serve the full range of its pupils' needs and abilities. This will include the organization of classes for the brightest pupils in each grade. These classes need not be either Intellectually Gifted or Special Progress.

In all schools, children who qualify for Intellectually Gifted and Special Progress Classes and who cannot be accommodated in their home schools, may be sent to other schools. The objective integration should be considered when such transfers are being contemplated by the principal and Assistant Superintendent.

5. The special classes for mentally retarded, physically handicapped, health conservation, etc., should be organized in a manner consistent with the basic concept of neighborhood schools. When, because of the small number of such pupils in a given school, it becomes necessary to transfer these pupils to another school, integration should be one of the criteria for placement.

6. The continuity of a pupil's school attendance should be maintained as far as possible. Changes in district lines should be such as to avoid frequent interruptions in the continuity of instruction.

7. Pupils should not be transported by bus from one school to another solely for the purpose of integration. However, when it becomes necessary to transport pupils by bus to relieve overcrowding and for better utilization of the school plant, integration of racial groups should

be one of the considerations in determining which pupils shall be moved and to which school.

8. The junior high school draws its pupils from a considerably large area than does the elementary school, and, therefore, will afford greater flexibility in the establishment of zoning lines. At this level the elementary school zoning criteria must also be taken into consideration, but additional consideration is to be given to integration by drawing zoning lines to include the areas of feeder schools or parts of the area of feeder schools in such a manner as to promote racial integration.

9. Any exceptions to the above principles may prevent the orderly implementation of the comprehensive zoning plan and disrupt the process of integration. Accordingly, the application of the principle of permissive zoning should in general be deferred to the senior high schools.

SENIOR HIGH SCHOOLS

The High School Division is composed of two sections: the vocational section and the academic section. In general, there are no zoning restrictions in the vocational high schools, and pupils may apply from any borough of the city. In the general vocational high schools, the pupils are more likely to come from the borough in which the school is located, while the specialized vocational high schools draw from all sections of the city. Actually, desirable ethnic distribution has been achieved in these schools, except that a school located in a homogenous area derives the major portion of its population from the immediate environs.

In the academic high school section different determinants are operative. There are four specialized high schools (Brooklyn Technical, Bronx Science, Stuyvesant, and Music and Art) that obtain their pupils on the basis of an entrance examination, and there are no zoning restrictions. In the boroughs of Brooklyn, Manhattan and the Bronx there are several single-sex schools, and, generally, these schools have borough-wide zones. The remaining academic schools are co-educational and have basically the same course offerings, including the academic course (college preparatory), the commercial course and the general course. The co-educational high schools have a distinct boundary or zone and only the pupils who reside within the boundary are permitted to attend the high school in the zone.

I. Basic Principles

1. The assistant superintendent assigned to the High School Division should have the responsibility for determining high school boundary lines.

2. Prior to making changes in existing school zones or in creating new school boundaries, the Divisional Assistant Superintendent should consult with the principals, the parent groups and the field Assistant Superintendents who have an interest in the new boundary lines.

3. Provisions should be made in each school for classes which will serve the full range of its pupils' needs and abilities. This will include the organization of honor classes in all schools.

II. Criteria for Zoning

1. The senior high school draws its pupils from a considerably larger area than does the elementary school or the junior high school and, therefore, will afford greater flexibility in the establishment of zoning lines. Because of this latitude, additional consideration can be given to racial integration provided it is consistent with other basic criteria.

2. Distance from home to school for high school pupils should be considered even though it is not given the same emphasis as in the case of the elementary or junior high school. A compact high school zone insures desirable community interest, strong parents associations and an active after-school program for pupils.

3. Maximum utilization of school space—In the face of mounting enrollments, it is necessary to adjust school zones to make the most efficient use of existing facilities.

4. Transportation—Since the majority of high school pupils use public transportation, the extent and relative convenience of its use should be considered when boundary lines are drawn.

III. Exceptions

1. The High School Division has granted exceptions to zoning regulations in order to promote racial integration. Examples of such exceptions may be found in examining the booklet "The Directory of the Public High Schools."

2. If the practice of zoning variances is to be extended, there are certain inevitable outcomes

to be considered and understood. Schools that are located in ethnically homogeneous areas will become under-utilized if the pupils of the feeder schools in the area are permitted to apply to schools out of the area. Eventually, the high schools in the zone will become so underpopulated that they will have to be abandoned. This event in turn will increase the overcrowded conditions in the adjacent zones, requiring additional high school facilities. Moreover, the high school in the zones adjacent to the area that has just been abandoned as a desirable zone for high schools, will soon develop a very high percentage of the ethnic group in the homogenous area.

In the interest of optimum utilization of school facilities, and in the interest of maintaining racial integration at desirable levels, the following recommendations are made:

a. As a guide, the ethnic composition of all schools in a borough should be ascertained.

b. Zoning maps, showing racial and ethnic composition by blocks, should be supplied.

c. Exceptions to zoning regulations should be made to feeder schools on the basis of specific numbers of specific schools.

d. The numbers to be assigned to specific high schools are to be determined on an arbitrary basis, a geographical basis, or a combination of the two. If the arbitrary basis is the one to be used, then each applicant in the graduating class of the feeder school who expects to take advantage of the zoning variance is to indicate, in the order of preference, the schools to which he seeks admission. As many first-choice preferences will be granted as possible. Second, third, etc., choices will be used in order to control the number that are to be admitted to the respective schools, also bearing in mind the other criteria that should be applied.

3. A zoning variance should be authorized if it will satisfy a subject need of an applicant, usually a foreign language.

4. A zoning variance should be authorized for an applicant because of health conservation, sight conservation, or the need for CRMD [Children with Retarded Mental Development] classes, or special need as indicated after study by the Bureau of Child Guidance.

WILLIAM JANSEN,
Superintendent of Schools.

EDUCATION
Public Schools—North Carolina

Pursuant to the provisions of the North Carolina "Pupil Placement Act" (1 Race Rel. L. Rep. 240, 939) sixteen Negro school pupils applied to the Mecklenburg County, North Carolina, Board of Education for reassignment to previously "white" schools. [Charlotte, the county seat, has a separate school system.] The board denied each request. On September 2, 1957, the board issued an explanatory statement of its action on these requests.

STATEMENT ADOPTED BY BOARD OF EDUCATION OF MECKLENBURG COUNTY, SEPTEMBER 2, *1957*

The Board of Education of Mecklenburg County, acting under the provisions of the North Carolina Pupil Assignment Law has carefully considered the requests of the parents of sixteen Negro pupils for reassignment to presently all-white schools.

Under the Pupil Assignment Law, the Board is enjoined to permit reassignment of a pupil if, after hearing, it shall find that the child is entitled to be reassigned to the school requested, or if it shall find that the reassignment of the child to the school requested will be for the best interests of the child, will not interfere with the proper administration of the school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children enrolled in the school requested.

After detailed study of each application in the light of these criteria, the Board has voted to deny each individual request.

In so doing, the Board is aware of the decisions of the Supreme Court of the United States in the School Segregation Cases.

It is also well aware that the school system of Mecklenburg County is presently facing serious problems in providing class room space for a

growing suburban population. It feels that, at the present time, these considerations are overriding ones in the administration of the Mecklenburg County school system.

Coupled with this, is the fact that three North Carolina school systems have voted to admit Negro students to formerly all-white schools this fall. The Board feels that it would be wise to await the experience of these three systems, and to attempt to apply it to the peculiar situation of Mecklenburg County.

Finally, the Board has been much concerned with its responsibility to the individual pupils involved. Unfortunately, counsel for these pupils refused to allow them to express their own preferences as to the school they wanted to attend at the hearing held last Friday.

The Board has done its best to discharge its duty under the law of our state, and to the parents and children of Mecklenburg County, to provide the best possible educational opportunities for each child.

Proper notification of this action will be sent to the parents of each child.

EDUCATION
Public Schools—Virginia

The form adopted by the Virginia Pupil Placement Board for use in assigning pupils to schools is reproduced on the next page. Set out below is a memorandum issued by the Board concerning the application and enforcement of the Pupil Placement Act.

COMMONWEALTH OF VIRGINIA
PUPIL PLACEMENT BOARD

22 N. 9th Street
Richmond, Virginia

August 19, 1957
Memo #11

TO: Division Superintendents
FROM: J. W. Bland, Executive Secretary
SUBJECT: Procedure for registering pupils at opening of 1957-58 session

A number of you have written and called, continuing to ask for a guide as to the procedure you should follow with the opening of your schools. You have our Memo #10, dated August 5, 1957, which sets forth very clearly the position of the Pupil Placement Board as follows:

> "So far as this Board is advised, the Pupil Placement Act has not been invalidated by any court of last resort; and this Board will continue to exercise its duties under the Pupil Placement Act. . ."

Therefore, the earlier directives, rules and regulations of the Pupil Placement Board, which you have in Memos 1-10, inclusive, are still in effect and operative. The following is the situation at present:

1. No child can be legally enrolled in the public schools of the Commonwealth of Virginia until an application has been filed in his behalf, unless he remains in the school in which he was enrolled prior to December 29, 1956.
2. Temporary enrollment by the local school officials is permitted, until the application can be acted upon by the Public Placement Board of Virginia.
3. Each child entering a given school for the first time in September must have an application filed in his or her behalf.
4. In order not to work a hardship on the pupils or their parents, a fifteen-day period is allowed in which to secure the application locally.
5. In the event there is a refusal on the part of the parent or legal guardian of the pupil to file an application in the pupil's behalf, at that moment the pupil is no longer legally enrolled, and should not be allowed to further attend the public schools of Virginia. The fifteen-day rule does not apply in such instances; and you should instruct your principals and teachers not to admit such a pupil to school at all, not even for one day.

If we can be of service, do not hesitate to call on us.

P.P.B. FORM NO. 1

School Division (City or County): _____

COMMONWEALTH OF VIRGINIA
PUPIL PLACEMENT BOARD
APPLICATION FOR PLACEMENT OF PUPIL

(NOTE: *A birth certificate or photostatic copy thereof shall be attached to the application of each pupil who has moved to Virginia from another state for whom application is made for enrollment in Virginia schools for the first time.*).

I, the undersigned parent/or legal guardian, or other person having custody of the child named below, request that this child be placed by the Pupil Placement Board of the Commonwealth of Virginia in the school in the County/or City of _____ which the Board deems most appropriate in accordance with the provisions of Chapter 70 of the Acts of the General Assembly (Extra Session 1956), and submit the following information:

FULL NAME OF CHILD: _____

ADDRESS: _____

POST OFFICE: _____

SCHOOL YEAR FOR WHICH ENROLLMENT IS REQUESTED: _____

NAME OF SCHOOL LAST ATTENDED: _____ WHEN: _____

ADDRESS OF SCHOOL: _____ COUNTY/OR CITY: _____

YEARS IN SCHOOL: _____ (EXCLUDE YEAR FOR WHICH THIS APPLICATION IS MADE) GRADE: _____ BIRTH DATE: _____

SEX: _____ CONDITION OF HEALTH: _____

PHYSICAL OR MENTAL HANDICAPS OR DISABILITIES: _____

_____

PARTICULAR APTITUDES: _____

NAME AND LOCATION OF SCHOOL OR SCHOOLS IN VIRGINIA IN WHICH ANY OTHER CHILDREN OF YOURS ARE ENROLLED: _____

The foregoing is certified on oath or affirmation to be true and complete.

Signed: _____

Date: _____ Address: _____

(FOR USE OF BOARDS ONLY)

INFORMATION AND RECOMMENDATIONS FROM LOCAL SCHOOL BOARD

If child is entering school for the first time is date of child's birth on application same as on birth certificate? _____

Comments concerning pupil: _____

_____

Recommendation as to school to which pupil should be assigned: _____

Principal or Head Teacher: _____ LOCAL SCHOOL BOARD

By: _____ (*Title*)

ACTION BY STATE BOARD

The above-named pupil is hereby assigned to _____ school in the County (City) of _____

_____

FOR THE PUPIL PLACEMENT BOARD OF THE COMMONWEALTH OF VIRGINIA

HOUSING
Urban Renewal—New Jersey

The Princeton, New Jersey, Mayor's Advisory Committee on Housing reported to the mayor on June 12, 1957, with respect to plans and recommendations for urban renewal. In the conclusion to its report the Committee referred to the problem of de facto racial zoning in Princeton as it affects the renewal program. That part of the report follows:

* * *

X. CONCLUSION

Your committee respectfully recommends, therefore, that the Urban Renewal program in the John-Witherspoon area be restricted to such activities as will up-grade existing residences in the area through consultation with the Executive Committee of the John-Witherspoon Association and with the present owners and that any demolition of homes be limited to those buildings where up-grading to meet health and engineering requirements is impossible.

The work of your committee would be incomplete without specific mention of the underlying problem which has touched almost every aspect of its deliberations during the past eight months.

Most of the Princeton citizens living in the John-Witherspoons area are Negro. Their resistance to substantial and rapid change in the area is based not only upon their firm conviction —shared by your committee—that most of their houses are not, in fact, substandard, but also upon a realistic understanding of the almost insuperable difficulties Negroes face in securing alternate housing in the Princeton area.

The future physical integrity of the John-Witherspoon area cannot be assured. The area is in the heart of Princeton's central district. Commercial, business, and traffic interests will almost certainly, over the years, make their mark upon existing land-use patterns—with resulting dislocations of population. Even if these changes were not probable, it is impossible to justify upon moral grounds the residential containment of Negro citizens.

Princeton will grow as a civilized community only as all sections of it are open without distinction to all citizens—as well as to visitors from abroad—who have the financial resources to secure or rent property. In view of the international character of the University, The Institute for Advanced Study, and the Princeton Theological Seminary, it is peculiarly important that the Princeton community set an example of equality of opportunity in all aspects of its social and economic life.

Every ethical resource in the community must be mobilized by educational, religious, fraternal, and civic leaders, if Princeton is to become a living example of American democracy at its best.

Only then will the basic problems of the John-Witherspoon area be truly solved.

ATTORNEYS GENERAL

EDUCATION
Public Schools—Arkansas

Following the assignment of troops of the National Guard by the governor of Arkansas to a high school in Little Rock, Arkansas, at the beginning of the 1957 school term (see the materials under *Aaron v. Cooper, supra* at p. 931.), the mayor of Little Rock requested from the state Attorney General an opinion with respect to his responsibility and authority for maintaining order in the city. The request is in the form of five questions which, with the answers of the Attorney General, are set out in the opinion.

STATE OF ARKANSAS
OFFICE OF ATTORNEY GENERAL

September 7, 1957

Honorable Woodrow W. Mann
Mayor
Little Rock, Arkansas

Dear Mayor:

I have your letter wherein you outline a certain factual situation and then pose five questions and request an official opinion thereon. The office of the Attorney General does not rule on questions of fact, but the following is in response to your legal questions:

1. Who has jurisdiction for the purpose of law enforcement over the city streets adjacent to and surrounding Central High School?

ANSWER: City, County, State and Federal laws may or may not be applicable, under a certain factual situation, to law enforcement on the streets adjacent to Central High. For this reason the Sheriff, Constable, State Police, City Police, National Guard and/or Federal officers might have exclusive, concurrent or overlapping jurisdiction as a particular factual situation might develop.

2. Do I have the legal authority under the present conditions to use the City Police Force to clear the lanes of traffic and to keep the crowd moving to prevent congestion and blocking of traffic?

ANSWER: I have heretofore rendered an opinion that the Governor has the legal right to call out the National Guard to maintain peace and order. Should it be the opinion of the troop commander that certain streets should be isolated from traffic to carry out the orders of the Chief Executive to so maintain peace and order, then such isolation of certain streets contiguous and adjacent to Central High would be in order and an exercise of legal concurrent jurisdiction.

3. If the Governor's forces should interfere with the City Police in the performance of their duties, what legal remedy do we have?

ANSWER: I treat your words "Governor's Forces" as meaning the National Guard of the State of Arkansas. Our Constitution designates the Chief Executive as Commander-in-Chief of the Guard and a detachment of the Guard has been dispatched to Central High School. Since the Guard is acting under the orders of the Commander-in-Chief, through the Adjutant General, and has established itself in and about Central High, they have assumed the patrol of certain grounds in that area. If you have any legal remedy, it, of course, would be through the Courts.

4. Is the Governor's authority to use the National Guard unlimited?

ANSWER: The Governor's authority in the use of the Arkansas National Guard is constitutional and statutory.

5. Is his decision to use the Guard subject to review by the Courts?

ANSWER: The decision of any official, from the President on down, is subject to review by the Courts, unless specifically excluded by the national or State Constitutions.

Very truly yours,

BRUCE BENNETT
Attorney General

PUBLIC ACCOMMODATIONS
Golf Courses—Michigan

The Attorney General of Michigan was requested for an opinion whether golf clubs which purport to restrict membership to members of a particular race but which sell liquor under a license would be considered "places of public accommodation" under the Michigan statute prohibiting discrimination on the grounds of race, color or religion in such places. The Attorney General stated that the holding of a Class "C" license by a club was evidence that it was not operating as a "private club" and was thus subject to the statute.

Opinion No. 3041 August 16, 1957

Honorable Basil W. Brown
State Senator
901 American Title Building
139 Cadillac Square
Detroit 26, Michigan

Dear Senator Brown:

Reference is had to your letter of recent date asking my opinion on the following question:

> Numerous golf clubs around the City of Detroit and Wayne County advertise and operate on a "semi-public" basis. This in effect bars members of various minority groups from being allowed to play, the pretext being that these courses operate as a club and are not, in a true sense of the word, public golf courses.
>
> Many of these courses have a Class C liquor license and serve in their clubhouses various forms of alcoholic refreshment. Are these courses, including both the clubhouse and golf course facilities public or semi-private, and are they within the purview of the Public Accommodation Statute and the regulations of the Liquor Control Commission as to class C licenses? Have they any legal basis for discrimination or for refusing to allow all members of the public to take advantage of their facilities?

The public accommodation statute to which you refer is Chapter XXI of the Penal Code,[1] usually referred to as the civil rights law, section 146 of which provides as follows:

> "All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities and privileges of inns, hotels, motels, government housing, restaurants, eating houses, barber shops, billard parlors, stores, public conveyances on land and water, theatres, motion picture houses, public educational institutions, in elevators, on escalators, in all methods of air transportation and all other places of public accommodation, amusement, and recreation, subject only to the conditions and limitations established by law and applicable alike to all citizens and to all citizens alike, with uniform prices."

The liquor law[2] provides, at section 2e, that a club, as therein defined, may obtain a club license to serve liquor after publication of notice as provided by the statute. In order to qualify to obtain and retain such a license, it is required that no member, agent or employee of the club shall receive any profit from the sale of liquor. The definition of "club" is as follows:

---

1. Act No. 328, Public Acts of 1931, as last amended by Act No. 182, Public Acts of 1956, being § 750.146 CLS et seq.; § 28.343, et seq. Stat Ann and Supps.
2. Act No. 8, Public Acts of the Extra Session of 1933, as amended, being § 436.1 CLS et seq.; § 18.971 et seq., Stat Ann and Supps.

"'Club' shall mean an association whether incorporated or unincorporated, the majority of whose members shall be citizens for the promotion of some common object (not including associations organized for any commercial or business purpose, the object of which is money profit) owning, hiring or leasing a building . . . and which shall have been in existence for a period of not less than 2 years prior to application for license under the provisions of this act."

A Class C license, under section 2t

"shall mean any place licensed to sell at retail beer, wine and spirits for consumption on the premises."

We also note that Act No. 182, Public Acts of 1956, the most recent amendment to the civil rights law, now provides that:

"Any person being an owner, lessee, proprietor, manager, superintendent, agent or employee of any such place who shall directly or indirectly refuse, withhold from or deny to any person any of the accommodations, advantages, facilities and privileges thereof or directly or indirectly publish, circulate, issue, display, post or mail any written or printed communications, notice or advertisement to the effect that any of the accommodations, advantages, facilities and privileges of any such places shall be refused, withheld from or denied to any person on account of race, creed or color or that any particular race, creed or color is not welcome, objectionable or not acceptable, not desired or solicited, shall for every such offense be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than $100.00 or imprisoned for not less than 15 days or both such fine and imprisonment in the discretion of the court; and every person being an owner, lessee, proprietor, manager, superintendent, agent or employee of any such place, and who violates any of the provisions of this section, shall be liable to the injured party, in treble damages sustained, to be recovered in a civil action: Provided, however, That any right of action under this section shall be unassignable. In the event that any person violating this section is operating by virtue of a license issued by the state, or any municipal authority, the court, in addition to the penalty prescribed above, may suspend or revoke such license."[3]

In considering your first question, whether such facilities as you describe are "public accommodations" within the meaning of the civil rights law, we have collated several recent cases from sister states.

In Simkins v. Greenboro,[4] a 1957 case, the city and the board of education, (which had leased land to the city on a public use basis) together leased an entire golf course to a golf club, a nonprofit corporation organized "solely for the purpose of taking the lease and maintaining and operating the course as a public golf course." The evidence showed that white persons were permitted to play by paying the green fees without any question and without being members. At p. 563:

"When Negroes asked to play, they were told they would have to be members before they could play and it clearly appears that there was no intention of permitting a Negro to be a member or to allow him to play, solely because of his being a Negro."

Six plaintiffs laid down their greens fees and insisted on their right to play, were ordered off the course by the manager when they reached the third hole, were arrested for trespass when they refused to leave, were convicted and served 30 days.

At p. 564:

"It is conceded that the defendants ordinarily are not required to furnish a golf course for its citizens. If, however, it undertakes to do it out of the public treasury, it cannot constitutionally furnish the facility to a part of its citizens and deny it to others similarly situated. The plaintiffs as citizens * * * are entitled to the equal protection of the law and cannot be deprived of their rights solely on account of color."

At p. 565:

"The facts show that the city is still 'in the saddle' so far as real control of the park is concerned and that the so called lease can be disregarded if and when the city decides to do it."

3. See OAG 1955-1956, Vol. II, p. 418, No. 2564, July 23, 1956, in which we ruled this statute constitutional.
4. 149 F.Supp. 562 (1957).

In Lawrence v. Hancock,[5] a public swimming pool, which had been financed by revenue bonds issued by the city, was leased to a "park association" for one dollar, the lease giving the lessee complete control, under which the lessee refused to admit Negroes. It was *held* the constitutional rights of Negro applicants had been violated.

In Derrington v. Plummer,[6] an action was brought to enjoin a county from renewing a lease on a court house cafeteria to a tenant who would exclude Negroes. The court said that the cafeteria is not operated for private use but is part of the court house public facilities, operated through the instrumentality of the lessee, who stands in the place of the county for purposes of this litigation. It was *held* that refusal to serve Negroes was discriminatory, and the injunction was granted.

In Everett v. Harron,[7] an action to enjoin a recreation park operator from refusing to admit Negroes, the facility was a privately owned park with a swimming pool, tennis courts, picnic grounds, and was held to be a place of public accommodation, resort or amusement under the civil rights act of the state, which the court said was not restricted in operation to the categories enumerated by the statute, but which included all other facilities of like class and nature. In this case, at p. 385, the court said that the park was operated for public accommodation, despite a "crude attempt to give the enterprise the character of a private club in order to justify selective admission," which the court said "was but a device to keep Negroes from the swimming pools."

In Gillespie v. Lake Shore Golf Club,[8] where a public course was leased to a private club, which in turn assigned the lease to a corporation, it was *held* that this device did not change the course from a public course to a private club, and that it was a "place of public amusement" within the Civil Rights Act.

In Castle Hill Beach Club v. Arbury,[9] where the facility was privately owned, and accommodated 13,000 per season, it was held that the use of a corporation was an illegal device to facilitate exclusion on a racial basis, the court saying at p. 440:

> "The overt and even blatant discriminatory practices of the past have succumbed, in recent years, to the condemnation of an aroused and enlightened public and to the enactment of remedial legislation. However, those determined to continue such intolerant and intolerable purposes have attempted to evade the charge of discrimination by changing their methods of operation. The variety of stratagems employed seems infinite, and the ruses and dodges are limited only by the extent of the practitioners' ingenuity.
> "No one can reasonably believe that deep-rooted prejudices can be legislated into oblivion or that they are susceptible of cure by law alone, but there can be no doubt that effective legal procedures coupled with educational processes will narrow the areas where bigoted practices exist and bring the high concepts of democracy nearer to fulfillment."

On the basis of these cases, it can be seen that courts have displayed a willingness to pierce the corporate veil, where such is employed as a device to evade the civil rights laws. Note especially that the last four cases cited involved facilities operated by private entrepreneurs, and that in all four cases the facilities so operated were judicially determined to be places of public accommodation, even where not financed with public funds.

So, in Michigan, it is established that places of public accommodation are subject to the requirements of the civil rights law though operated by private owners. See, for example, Bob-Lo Excursion Co. v. People of Michigan,[10] Ferguson v. Gies,[11] Bolden v. Grand Rapids Operating Company.[12]

Therefore it seems that if such "semi-public" clubs as you describe are in fact operating as places of public accommodations, and their course of conduct can be proven to be of such a nature, then the court can find that the facility is public within the Michigan civil rights law despite the use of the club or corporate device to justify selective admission.

5. 76 F.Supp. 1004 (1948).
6. 240 F.2d 922 (1956) 5th Circ.
7. 380 Pa. 123, 110 2d 383 (1955).
8. 91 NE 2d 290 (Ohio).
9. 142 NYS 2d 432, 208 Misc. 35.
10. 333 U.S. 686, affirming 317 Mich 686 (corporation engaged in transporting passengers to a resort island and in operating the island, virtually all of which it owned, was properly convicted of violation of the civil rights statute for refusing accommodation to a high school girl solely on account of color).
11. 82 Mich 358. Restaurant keeper was in violation of civil rights act by refusing to serve colored persons except in a certain part of the room, and such persons had an action in damages despite fact that act was then penal in nature.
12. 239 Mich 318 (1927).

Whether or not a particular club is operating as a public facility and is practicing systematic exclusion of persons in such a manner as to violate the civil rights law is a question of fact,[13] which is the province of a court to decide.

The designation "club" or "semi-private" would not in and of itself be conclusive as to the fact of public accommodation or of exclusion.

The holding of a "Class C" license by such a club, since such a license is by statute provided for those selling at retail, would be proper evidence that the particular golf club was not operating on a *bona fide* basis as a private club, since club licenses are restricted to associations or entities not organized for any commercial or business purpose. Also relevant would be requirements as to membership fees, enforcement of collection of membership fees, by-laws concerning admission, and by-laws and established course of conduct with respect to finances.

It is therefore my opinion that

1. Any golf club having a Class C license and operating on a basis of admitting all members of the public of Caucasian race, but excluding non-Caucasians, when such course of conduct is proved in a court of law, is subject to the provisions of the civil rights act.
2. It is my further opinion that the court in such a case may in its discretion suspend or revoke the license under the provisions of Act 182, Public Acts of 1956, in addition to imposing the other penalties provided by the civil rights law.

Very truly yours,

THOMAS M. KAVANAGH
Attorney General

13. Goldsberry v. Kamachas, 255 Mich 647 (1931).

APPROPRIATIONS
Expenditures—Georgia

The Attorney General of Georgia was requested by the governor for an opinion whether public funds might legally be expended for the purpose of distributing bulletins and reports of the Georgia Commission on Education relating to school segregation. The Attorney General replied that, pursuant to a provision of the state constitution authorizing taxation for the purpose of advertising and promoting the "historic . . . resources of the State of Georgia," such expenditures would be valid.

July 11, 1957

Honorable Marvin Griffin, Governor
State of Georgia
State Capitol
Atlanta, Georgia

Dear Governor:

This is to acknowledge your request for my official opinion on the question of whether or not legal expenditure of public funds can be made by the Georgia Commission on Education, pursuant to the Act approved February 15, 1957 (Ga. Laws 1957, p. 56).

Georgia Laws 1957, page 56, provides as follows:

"Whereas, the Georgia Commission on Education was created in 1953 to cope with the problems relating to education which have confronted the State in recent years and which continue to be of primary importance to all the citizens of Georgia, and

Whereas, the commission has performed an excellent service and its work has become increasingly important, and

Whereas, the commission is authorized to distribute bulletins and periodicals concerning its work and the problems which are presented, with comments thereon, and

Whereas, the people of the entire nation should be made aware of these problems and the Georgia and southern viewpoint relating thereto, in order that the distorted views which have been presented by certain segments of the Northern press and other periodicals may be combatted.

Now, therefore, be it resolved by the General Assembly of Georgia that the Georgia

Commission on Education is hereby authorized to proceed as aforesaid in presenting such problems and views, and funds therefor shall be made available as provided by law."

The Georgia Constitution of 1945, Art. VII, Sec. 11, Par. 1 (Ga. Code Ann., §2-5501) provides in part as follows:

"Powers of taxation over the whole State shall be exercised by the General Assembly for the following purposes only:

(1) For the support of the State Government and the public institutions.

. . . .

(2) To advertise and promote the agricultural, industrial, historic, recreational and natural resources of the State of Georgia. . . . ."

Baros v. Camp, 209 Ga. 38, held:

"While, under the Constitution, the judiciary has the power and duty to declare void legislative acts in violation of the Constitution of the State or of the United States, the conflict between the act and the fundamental laws must be clear and palpable before the act of the coordinate department of the government will be declared unconstitutional. It is the duty of courts to put such construction upon statutes, if possible, as to uphold them and carry them into effect."

Franklin v. Harper, 205 Ga. 779, 790, held:

"Every presumption favors the constitutionality of a regularly enacted statute. Only where it manifestly impinges upon the Constitution or violates rights of citizens will it be declared unconstitutional."

In addition, it is clear from the Constitution that only the judiciary may declare a legislative act unconstitutional. Calhoun v. McLendon, 42 Ga. 405.

It is my opinion that the provision of the Constitution authorizing the General Assembly to tax for the "support of the State Government and the public institutions" includes the use of such tax money for the purpose of distributing bulletins and reports of the Commission with respect to its findings and studies. It is also my opinion that the provision of the Constitution authorizing the General Assembly to tax for the purpose "To advertise and promote the . . . historic . . . resources of the State of Georgia.", includes the use of such tax money for the purpose of advertising the "historic" origin, basis and legal and moral justification for Georgia's established social patterns to the end that the public peace and domestic tranquility may be preserved.

With kindest regards and best wishes, I am

Sincerely yours,
s/ Eugene Cook
The Attorney General

REFERENCE

ENFORCEMENT OF COURT ORDERS

Federal Contempt Proceedings and Prevention of Obstruction

The question of whether there has been a failure to abide by the requirements of law must be adjudicated through cases instituted in the courts before enforcement procedures become specific and pointed (and perhaps costly and painful) as applied to individual persons.

If a criminal charge is involved, a successful prosecution typically leads to the imposition of a fine or prison sentence on the convicted person. If the litigation is civil, rather than criminal, its successful conclusion for the plaintiff typically leads to a judgment for damages or a decree directing that certain persons act or refrain from acting in specified ways. This study will not be concerned with the satisfaction of a money judgment but rather with the effectuation of a mandatory or prohibitory decree. If this order of the court is not obeyed, the next step, traditionally, has been the institution of contempt proceedings.

Centering on the operation of the federal courts, this study will collect background material relating to the power to punish for contempt and to the means of protecting the functioning of the federal judicial machinery against obstructions. The use of troops by state governors and by the President of the United States will be given consideration only to the extent that such use affects the operation of the federal courts either by way of conflict or obstruction or by way of supplementary enforcement procedure.

I. Contempt of Court

Introduction

The term "contempt" has been used to denote any wilful disregard of, or disobedience to, public authority. In England contempts consisted of disregard of the authority of the executive, legislative or judicial branches of the government, but in the United States contempts have been confined to actions directed against legislative and judicial authority. See Beale, *Contempts of Court, Criminal and Civil*, 21 Harv. L. Rev. 161 (1908). Contempts of court, then, may consist of any act or omission which is in disregard of, disobedience to, interference with, or resistance to an order of the judiciary, or which reflects upon its integrity as the administrator of justice, or which intentionally disrupts the orderly proceedings of a court. See Black, *Law Dictionary* 390 (4th Ed. 1951); 12 *Am. Jur., Contempt* §§ 1-3 (1938); *Civil and Criminal Contempt in the Federal Courts*, 57 Yale L. J. 83 (1947); Note, 10 Vand. L. Rev. 831 (1957).

Contempts are classified as direct or indirect, the distinction depending on whether the contempt is committed in the "presence of the court" or not. Direct contempt includes those acts of which the court has knowledge by personal observation or which occur so near to the court as to obstruct or interrupt the due administration of justice. Indirect contempts, also referred to as "consequential" or "constructive", consist of those acts or omissions which are committed at a distance from, rather than in the presence of the court. Thomas, *Problems of Contempt of Court* 3 (1934). See also Dangel, *Contempt* § 7 (1939); 12 *Am. Jur., Contempt* §§ 4-5 (1938). Historically, the distinction may have depended upon the degree, rather than the proximity, of the opposition to the court's authority. 4 Blackstone, *Commentaries* 283-84 (Lewis Ed. 1902).

Contempt Proceedings

It is important to note the purpose, nature and classification of contempt proceedings. The Supreme Court has said that the purpose of contempt proceedings is "to uphold the power of the court, and also to secure to suitors therein the rights by it awarded." *Bessette v. W. B. Conkey Co.*, 194 U.S. 324, 327, 24 S.Ct. 665, 48 L.Ed. 997 (1904). It should be added that contempt proceedings are also designed to uphold the dignity of the court and to remove all obstructions to the administration of justice. Because some right to punish persons flouting the authority of the court is regarded as essential to the operation of the judicial system, the contempt power is said to be an inherent power of the courts. See *supra*, p. 1053.

The specific nature of contempt proceedings is not clear. The Supreme Court has said that the proceedings are *sui generis*, consisting of an exercise of the inherent power of the judiciary to enforce obedience. *Myers v. United States*, 264 U.S. 95, 44 S.Ct. 272, 68 L.Ed. 577 (1924).

> "A contempt proceeding is *sui generis*. It is criminal in its nature, in that the party is charged with doing something forbidden, and, if found guilty, is punished. Yet it may also be resorted to in civil as well as criminal actions, and also independently of any civil or criminal action." *Bessette v. W. B. Conkey Co., supra*, 194 U.S. at 326.

It has also been said, however, that contempt proceedings are criminal in nature and that contempts are specific criminal offenses. Indeed, the Supreme Court has held that contempt of a federal court is an offense against the United States. *New Orleans v. Steamship Co.*, 20 Wall. 387, 392, 22 L.Ed. 354 (1874). See also *Hayes v. Fischer*, 102 U.S. 121, 26 L.Ed. 95 (1880); *In re Swan*, 150 U.S. 637, 14 S.Ct. 225, 37 L.Ed. 1207 (1893); *State v. Dent*, 29 Kan. 416, 418 (1883). However, in spite of such language, contempts have not been considered criminal offenses within the meaning of Art. III, Cl. 3, or Amendment 6 of the Constitution, guaranteeing the right of trial by jury in criminal cases. See *infra*, p. 1057.

Classes of Proceedings

The proceedings for the punishment of contumacious conduct are divided into two classes—civil and criminal. The distinction is based mainly on the two distinct purposes of the use of the contempt power, namely, to coerce and to punish. Briefly, civil contempt proceedings are remedial, in the sense that they are designed to secure for the successful litigant the advantages of the orders of the court, by coercion of the unsuccessful party to the litigation. Criminal contempt proceedings, on the other hand, are punitive, being designed to vindicate the authority and dignity of the court. The principal test is the purpose of the sanctions imposed on the contemptuous party:

> "Contempts are neither wholly civil nor altogether criminal. . . . It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases. If it is for civil contempt, the punishment is remedial, and for the benefit of complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." *Gompers v. Buck Stove & R. Co.*, 221 U.S. 418, 441, 31 S.Ct. 492, 55 L.Ed. 797 (1911).

This test was reiterated in *McCrone v. United States*, 307 U.S. 61, 64, 59 S.Ct. 685, 83 L.Ed. 1108 (1939), where the court noted that a contempt was civil "when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public." A further difference is that civil contempt proceedings are a part of the original action, while criminal contempt proceedings are separate proceedings at law. And generally, the constitutional limitations which surround an accused in a criminal case, with the exception of trial by jury, are applicable in criminal contempt proceedings. See *infra*, p. 1056.

Some courts have attempted to classify contempts according to the civil or criminal nature of the act or omission itself. In the *Bessette* case, *supra*, the Supreme Court described the conduct which it labelled civil and criminal, and concluded that "a significant and generally determinative feature [of civil contempt] is that the act is by one party to the suit in disobedience of a special order made in behalf of the other." 194 U.S. at 329. However, the difficulties of classifying contempts according to the civil or criminal nature of the conduct itself was pointed out by the court in *United States v. United Mine Workers*, 330 U.S. 258, 298-99, 67 S.Ct. 677, 91 L.Ed. 884 (1947), where it was observed that the same conduct may amount to both civil and criminal contempt.

The Contempt Power

Sources

There has been almost unanimous agreement among the courts of the United States and of the several states that the power to punish or coerce for contempt is inherent in courts of general jurisdiction. The Supreme Court has consistently stated that the federal courts, from the very nature of their institution, possess the general contempt power. See *Ex parte Terry*, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405 (1888). Perhaps the most succinct statement of the doctrine of inherent power to punish for contempt is found in *Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry.*, 266 U.S. 42, 65-66, 45 S.Ct. 18, 69 L.Ed. 162 (1924):

> ". . . That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power."

The importance of this doctrine is found in the decisions holding that statutes limiting, regulating or defining the contempt power of the courts constitute unconstitutional interference with the inherent powers conferred upon the judiciary by the Constitution. The rationale of these decisions is that since the power to punish for contempt is inherent in the judiciary, the legislature did not give the power, and so can not curtail it. To allow legislative interference would do violence to the doctrine of separation of powers. See *State v. Morrill*, 16 Ark. 384 (1855); Thomas, *supra*, 47-52 (1934). (The constitutionality of statutes granting defendant the right to trial by jury in contempt cases is discussed *infra*, p. 1059.)

Some states have vague constitutional provisions granting the legislature authority to regulate contempt power of the judiciary; however, these provisions have been strictly construed so as to minimize the effect of the limitation on the courts' inherent power. Thomas, *supra*, 47-48. In the absence of these specific constitutional grants, the power of the legislature has sometimes been said to depend upon whether the court is created by the constitution or the legislature. Thomas, *supra*, 48. Thus, in *Ex parte Robinson*, 19 Wall. 505, 22 L.Ed. 205 (1873) and *Michaelson v. United States, supra*, the court indicated that although the authority of Congress to regulate the contempt power of the Supreme Court itself was open to question, it could regulate the contempt power of the "inferior federal courts." However, "the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative." *Michaelson v. United States, supra*, 66. Interpretation of such language has led to the suggestion that the proper basis of distinction is between regulatory and limitary legislation, the former being valid and the latter invalid. For a review of the decisions making this distinction, see Thomas, *supra*, 50-52. However, the areas of regulation, limitation, and abrogation remain uncertain, and the ultimate question seems to be the extent to which the legislature can impose limitations short of abrogation. Perhaps the principal issue in race relations cases is the validity of legislation granting jury trials in contempt cases. See discussion of jury trials, *infra*, p. 1057.

Federal Statutory Power

The Judiciary Act of 1789 included a provision giving federal courts the power "to punish, by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." (Ch. 20, section 17). As a result of the abuses of the contempt power, culminating in impeachment proceedings against Judge James H. Peck, the Act of March, 1831, ch. 98, 4 Stat. 487, was passed, entitled "An Act declaratory of the law concerning contempts of court." The applicable section, as presently codified in 18 U.S.C.A. § 401 (1950), reads as follows:

> "§ 401. **Power of Court.**
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempts of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Effect Debated

There has been much discussion concerning whether the statute actually limits the federal courts' contempt power or whether, as the title would imply, it is "declaratory" of the power already possessed by the federal courts. See, *e.g.*, Thomas, *supra*, 55-59; Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts*, 37 Harv. L. Rev. 1010, 1029, 1037-38 (1924). The answer to this question is significant with regard to the phrase "so near thereto as to obstruct the administration of justice," now appearing in 18 U.S.C.A. § 401 (1). If the Act were merely declaratory of the power to punish for contempts, the courts would have the power to punish for acts which occurred almost anywhere provided they had a tendency to obstruct the administration of justice. If, however, the Act limited the power of the federal courts, they could punish only those contempts which were in close physical proximity to them. The conflicting opinions on this question are reflected in the cases. In several early decisions, the Supreme Court found that the Act limited the contempt power, as in *Ex parte Robinson*, *supra:*

> ". . . As thus seen the power of these courts [inferior federal] in the punishment of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes." 86 U.S. at 511.

Ex parte Savin, 131 U.S. 267, 9 S.Ct. 699, 33 L.Ed. 150 (1889), observed that the Act of March, 1831, "materially modified that of 1789, in that it restricted the power of the courts to inflict summary punishments for contempts to specified cases." See also *In re Terry*, *supra*. In an opinion handed down during the same term as *Ex parte Savin*, the court said that the effect of the Act of March, 1831, was "to narrow the field for the exercise of their general power, as courts of superior jurisdiction, to punish contempts of their authority." *Ex parte Cuddy*, 131 U.S. 280, 285, 9 S.Ct. 703, 33 L.Ed. 154 (1889). However, the lower federal courts on numerous occasions failed to follow this view, and instead imposed summary punishment for actions occurring at considerable distances from the courts because the acts were regarded as obstructive to the course of justice. And in 1918, the Supreme Court held that the Act of March, 1831, "conferred no power not already granted and imposed no limitation not already existing." *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 419, 38 S.Ct. 560, 62 L.Ed. 1186 (1918). The court continued:

> ". . . The provision, therefore, conformably to the whole history of the country, not minimizing the constitutional limitations nor restricting or qualifying the powers granted, by necessary implication recognized and sanctioned the existence of the right of self-preservation, that is, the power to restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power given by summarily treating such acts as a contempt and punishing accordingly." 247 U.S. at 419.

Frankfurter Challenges

This decision aroused much comment. See, e.g., Frankfurter and Landis, *supra;* Nelles and King, *Contempt by Publications*, 28 Colum. L. Rev. 401 (1928). Mr. Justice Frankfurter, then Professor Frankfurter, and Professor Landis, said of the decision:

> ". . . Abuse of power [in 1831] furnished a great 'public grievance,' the country became deeply aroused, a remedy was deliberately 'applied by the Legislature,' it was followed widely in State legislation, it became imbedded in the practice and decisions of the Federal courts—yet three generations later the Chief Justice finds that nothing had really happened!" 37 Harv. L. Rev. at 1029.

The attitude of Mr. Justice Frankfurter and Professor Landis received approval in *Nye v. United States*, 313 U.S. 33, 61 S.Ct. 810, 85 L.Ed. 1172 (1941), in which the court overruled the *Toledo Newspaper* case, conceding that the historical inaccuracy of the statements made in the earlier opinions had been plainly demonstrated by Frankfurter and Landis, *supra*. The Act of March, 1831, was now acknowledged to have been intended to curtail substantially the "previously undefined power of the courts." The phrase "so near thereto" was construed to mean that there must be misbehavior in the geographical vicinity of the court: there must be physical proximity to the court, not merely a direct relation to the work of the court. Those acts which have only a causal proximity are to be prosecuted

as crimes under Section Two of the Act of March, 1831. (See Obstruction of Justice, *infra*, p. 1067.)

Position Restored

It would seem, therefore, that § 401 (1), which deals with "misbehavior of any person," is now back to the position it had attained under *Ex parte Robinson, supra.* Under present doctrine, the misbehavior must occur in the actual presence of the court or within its "constructive" presence. This latter term takes in "every part of the place set apart for its own use, and for the use of its officers, jurors, and witnesses." *Ex parte Savin, supra,* 277.

The *Toledo Newspaper* case concerned the power of the court to punish, as a direct contempt, the publication of editorials and other articles which defamed the judge and reflected upon his honesty and impartiality. Since the decision in the *Nye* case, apparently these acts can only be punished by indictment, in the absence of an order restraining publications of this nature. If such a restraining order is issued and thereafter the publication is made, such disobedience of the order would be punishable as a contempt under § 401 (3). See discussion, *infra.* For an extensive discussion of contempts by publication, see Thomas, *supra,* Chapter IV, 19-36; 12 *Am. Jur., Contempt* § 36 (1938; Supp. 1956).

In *Ex parte Robinson, supra,* the court pointed out that § 401 (2) was designed to insure the faithfulness of the officers of the court in their official transactions. The question left open was the meaning of the term "officers." *Cammer v. United States,* 350 U.S. 399, 76 S.Ct. 456, 100 L.Ed. 474 (1956), partially answered this question by holding that an attorney was not an officer within the meaning of the section. The court used the following language to indicate the meaning of officers:

> ". . . We see no reason why the category of 'officers' subject to summary jurisdiction of a court under § 401 (2) should be expanded beyond the group of persons who serve as conventional court officers and are regularly treated as such in the laws." 350 U.S. at 405.

The third sub-section of § 401 is by far the most important, at least in so far as race relation law is concerned. It recognizes the courts' power to punish as contempt disobedience or resistance to lawful writs, orders, decrees, wherever the disobedience or resistance occurs and whether or not the acts charged as contemptuous constitute independent crimes punishable by indictment and criminal prosecution.

Constitutional Limitations

In determining whether any specific constitutional guaranty applies to a contempt proceeding, it is necessary to distinguish between direct and indirect contempts and between civil and criminal contempt proceedings. Different substantive and procedural constitutional limitations apply to these different classifications.

Direct contempts, which are committed in the presence of the court, are limited by few, if any, constitutional provisions. In these cases, the court has ruled that there is no need for notice, presentation of evidence, assistance of counsel or opportunity to prepare a defense. See *Cooke v. United States,* 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (1925); *Ex parte Terry, supra.* The rationale of these decisions apparently stems from the notion that the direct contempt power is absolutely necessary to the administration of justice. In *United States v. United Mine Workers, supra,* Justices Black and Douglas, concurring, pointed out the necessity for the use of summary methods:

> ". . . Disorder in the courtroom, or so near to it as to interrupt a trial, and disobedience of an affirmative court order, are typical examples of offenses which must necessarily be dealt with summarily. To remove such imminent interference with orderly judicial proceedings, courts must have power to act immediately." 330 U.S. at 331.

In the *Cooke* case, however, the court noted that this summary procedure was so contrary to the usual due process requirements that "the assumption that the court saw everything that went on in open court was required to justify the exception." 267 U.S. at 536. It should be noted that the contempts so committed will generally be punished in criminal contempt proceedings, since the purpose is to vindicate the authority of the court.

Due Process Requirements

Indirect contempts, or those which are not committed in open court, are not punishable by such summary methods. The due process requirements were set forth in the *Cooke* case:

"Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed." 267 U.S. at 537.

Civil contempt proceedings are subject to the same rules as are applicable to civil cases generally, and are actually a part of the original cause which produced the order or decree sought to be enforced by the contempt proceedings. See *Gompers v. Buck Stove & R. Co., supra.*

Criminal proceedings for indirect contempts, on the other hand, must be prosecuted in conformity with the practice in criminal cases with the exception that accused has no right to jury trial, *Michaelson v. United States, supra,* 65. The contemnor is presumed to be innocent and must be proved to be guilty beyond a reasonable doubt. Further, the contemnor may not be compelled to testify against himself, since the privilege against self-incrimination is applicable "not only to crimes, but also to quasi-criminal and penal proceedings." *Gompers v. Buck Stove & R. Co., supra* at 448. In the *Michaelson* case, the court compared criminal contempts and criminal cases, reiterating the constitutional limitations set forth in the *Gompers* case, and stating that the "fundamental characteristics of both are the same." 266 U.S. at 66. It should be noted that the punishment for contempts which are also crimes does not preclude a prosecution for the crime, since the two are separate offenses; that is, the contemnor is not placed in double jeopardy by prosecutions both for the contempt and for a criminal offense based on the same act. See *In re Debs,* 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092 (1895); *O'Malley v. United States,* 128 F.2d 676 (8th Cir. 1942), *appeal dismissed,* 314 U.S. 574, 62 S.Ct. 116, 86 L.Ed. 465 (1941), *rev'd on other grounds,* 317 U.S. 412, 63 S.Ct. 268, 87 L.Ed. 368 (1943).

Criticism of Power

It has been said that the practical operation of the contempt power invades the due process requirements of the Federal Constitution, since the judge may be said to sit in his own case, and be the prosecutor, judge, jury and executioner. This procedure is said to deprive the contemnor of the right to a fair and impartial trial in a case of a criminal character. Thomas, *supra,* 11. In *Cooke v. United States, supra,* this objection was recognized, and the trial court was urged to exercise self-restraint, particularly where the contempt charged includes personal criticism or attack on the action of the judge. The court said:

"... All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge, called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place." 267 U.S. at 539.

First Amendment

The provisions of the First Amendment guaranteeing freedom of the press and freedom of speech have often been urged as limitations on the contempt power. Indeed, it was the punishment of a contemptuous publication which led to the impeachment of Judge James H. Peck and the subsequent passage of the Act of March, 1831. See Thomas, *supra,* 25-27. The concurring opinion of Mr. Chief Justice Taft in *Craig v. Hecht,* 263 U.S. 255, 278-280, 44 S.Ct. 103, 68 L.Ed. 293 (1923), illustrates the conflict between the contempt power and the constitutional guaranty of freedom of the press:

"It is of primary importance that the right freely to comment on and criticise the action, opinions and judgments of courts and judges should be preserved inviolate; but it is also essential that courts and judges should not be impeded in the conduct of judicial business by publications having the direct tendency and effect of obstructing the enforcement of their orders and judgments, or of impairing the justice and impartiality of verdicts." 263 U.S. at 278.

The chief justice distinguished between published criticism, however false or malicious, which concerned matters finally adjudicated, and those publications which were "intended and calculated to obstruct and embarrass the court in a pending proceeding in the matter of the

rendition of an impartial verdict, or in the carrying out of its orders and judgment." 263 U.S. at 278. Only in the latter case could the court have punished the publisher for contempt. However, since *Nye v. United States, supra,* held that the court's power to punish acts under § 401 (1) was limited to acts which occur in physical or geographical proximity to the court, a mere tendency to obstruct the administration of justice is not sufficient to give a court power to punish the action as contempt. The *Nye* case, overruling the *Toledo Newspaper* case, certainly restricts the power of the federal court to punish critical publications as direct contempts. It would seem that such publications, to be punishable as contempts, must be in disobedience of or resistance to a court order, under § 401 (3). See Thomas, *supra,* 21-33.

In a series of decisions subsequent to the *Nye* case, the Supreme Court has ruled that the power of state courts to punish publications as contempts is restricted by the Fourteenth Amendment as it incorporates the guarantees of freedom of speech and press. *Bridges v. California,* 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941); *Pennekamp v. Florida,* 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946); *Craig v. Harney,* 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947). It appears that, quite apart from the limitations imposed by Congress, a federal court cannot punish as a contempt any publication which comes within the scope of the First Amendment guarantees. In the *Bridges* case the court, referring to the federal contempt statute which it had recently construed in the *Nye* case, declared:

> "But we do find in the enactment viewed in its historical context, a respect for the prohibitions of the First Amendment, not as mere guides to the formulation of policy, but as commands the breach of which cannot be tolerated." 314 U.S. at 267.

Trial by Jury

As a general rule, contempt proceedings are not within the scope of the constitutional guarantees of trial by jury in the federal or state constitutions, *Ex parte Terry, supra;* nor does the due process clause of the Fourteenth Amendment require jury trials in state contempt proceedings. *Eilenbecker v. District Court of Plymouth County,* 134 U.S. 31, 10 S.Ct. 424, 33 L.Ed. 801 (1890). See also *Fisher v. Pace,* 336 U.S. 155, 69 S.Ct. 425, 93 L.Ed. 569 (1949).

Finding that summary contempt procedure was regarded as due process of law when the Fourteenth Amendment was adopted, the court in the *Eilenbecker* case upheld the authority of the state court to punish for contempt without the interposition of a jury to find the facts or to assess the punishment:

> "If it has ever been understood that proceedings according to the common law for contempt have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power." 134 U.S. at 36.

Only a few states have successfully provided for trial by jury in contempt proceedings, and many attempts to provide jury trials have been declared unconstitutional as invading the inherent powers of the judiciary. See 103 Cong. Rec. 11240-43 (daily ed. July 23, 1957); Thomas, *supra,* 47-52.

The United States Constitution provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," (Art. III, Clause 3), and that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed." (Amendment 6). These provisions guarantee trial by jury as it existed at the time the Constitution was adopted, see *Patton v. United States,* 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930), but the Supreme Court has consistently held that contempt proceedings are not within their scope. See *Ex parte Terry, supra.* Several rationales have been found for this conclusion. The decisions have been based primarily on the necessity of the inherent power of the court and the antiquity of the use of summary procedure:

> ". . . To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency." *In re Debs,* 158 U.S. 564, 595, 15 S.Ct. 900, 39 L.Ed. 1092 (1895).

In the *Gompers* case the court noted that the courts "must be authorized to exercise it [the summary contempt power] without referring the issues of fact or law to another tribunal or to a jury in the same tribunal." 221 U.S. at 450. See also *Jury Trial for Criminal Contempts*, 65 Yale L. J. 846 (1956). Another reason for holding these constitutional guarantees inapplicable to contempt proceedings is that contempt proceedings are *sui generis*, and not criminal prosecutions. (See discussion of nature of contempts, *supra.*)

Blackstone's View

The assumption that the use of summary procedure in contempt proceedings is an ancient practice has been severely challenged, though the courts taking the traditional view have usually cited Blackstone as authority:

> "The process of attachment for these and the like contempts must necessarily be as ancient as the laws themselves; for laws without a competent authority to secure their administration for disobedience and contempt would be vain and nugatory. A power, therefore, in the supreme courts of justice, to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal." 4 Blackstone *Commentaries* 286 (Lewis ed. 1902).

The undelivered opinion of Judge Wilmot, later Lord Chief Justice, in *King v. Almon*, provided additional authority for the proposition that summary procedure in contempt proceedings was of "immemorial usage." See Frankfurter and Landis, *supra*, 1046-49.

The research of Sir John Charles Fox, summarized by Frankfurter and Landis (37 Harv. L. Rev. at 1042-49), casts doubt on the accuracy of the conclusions of Blackstone and Wilmot. He found that in cases of contempt not committed by persons officially connected with the courts, jury trials were the rule until the early part of the eighteenth century, unless the contemnor confessed or the contumacious act was committed in the actual presence of the court. At that point the Star Chamber was established, and assumed all authority over contempts against any court, introducing summary procedure without trial by jury. After the abolition of the Star Chamber, the common law courts, apparently on the basis of Wilmot's opinion, adopted the summary methods which had been established. According to Frankfurter and Landis,

> "Wilmot confused 'immemorial usage' to punish for criminal contempts and 'immemorial usage' to punish *only after verdict by jury*. For a hundred years the law has been seeking to extricate itself from his confusion." 37 Harv. L. Rev. at 1049.

Congressional Action

Congress has provided for trial by jury in certain cases, but only after many commentators sought such reform, particularly in labor injunction cases. See Thomas, *supra*, 9, 37-45; Frankfurter and Landis, *supra;* Beale, *supra.* Section 402, Title 18, United States Code, provides that contempts which also constitute criminal offenses under the laws of the United States or the state in which the act was committed are to be prosecuted in conformity with 18 U.S.C.A. § 3691 (1950); but it expressly excludes direct contempts and contempts committed in disobedience of the lawful orders entered in suits brought or prosecuted in the name of, or on behalf of, the United States. These latter and all other contempts not expressly covered by Section 402 are punishable in summary proceedings.

Section 3691, which was originally contained in Section 22 of the Clayton Act, 38 Stat. 738 (1914), provides for jury trials in contempt proceedings where the contempt is also punishable as a crime:

> "Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by jury, which shall conform as near as may be to the practice in other criminal cases.
>
> "This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process,

> order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States."

Section 3692 provides for "a speedy and public trial by an impartial jury of the state and district wherein the contempt shall have been committed" in all cases in which the allegedly contemptuous action consists of the violation of an injunction or restraining order entered in a suit growing out of a labor dispute, but excepts direct contempts and contempts by officers of the court from its provisions. Section 3693 provides legislative sanction for Rule 42 of the Federal Rules of Criminal Procedure, which regulates trial procedure in the various contempt proceedings, and includes the following statement: "The defendant is entitled to trial by jury in any case in which an Act of Congress so provides."

Constitutionality of Legislation

In *Michaelson v. United States, supra,* the Supreme Court passed on the constitutionality of legislation providing for jury trials in certain contempt cases. The petitioners were striking employees of the Chicago, St. Paul, Minneapolis & Omaha Railway, and were charged with contempt for alleged violations of a preliminary injunction. They applied for a jury trial under the provisions of the Clayton Act, (now Sec. 3691) but the district court denied their application, proceeded without a jury, and after a hearing found them guilty and fined them. On appeal, the circuit court of appeals affirmed the convictions, holding Section 22 of the Clayton Act unconstitutional on the ground that the contempt power of the federal courts is inherent, derived from the Constitution, and therefore, that Congress is without authority to interfere with this independent power of the judiciary. 291 Fed. 940 (7th Cir. 1923). The Supreme Court reversed, holding the provision, strictly construed, valid as a regulation of the power of "inferior" federal courts, created by Congress, to punish for indirect contempts in a criminal proceeding. The court, emphasizing that for the statute to apply the act charged as a contempt must also be a crime, found that the statute refers only to criminal contempt proceedings. Since criminal contempt proceedings are between the contemnor and the public and are independent proceedings at law, this limitation of the effect of the statute relieved the court "of the doubt which might otherwise arise in respect of the authority of Congress to set aside the settled rule that a suit in equity is to be tried by the chancellor without a jury unless he choose to call one as purely advisory." 266 U.S. at 65. Secondly, the court found that the statute did not interfere with the inherent power of the courts to punish for contempt, but was a permissible regulation:

> ". . . That it [the contempt power] may be regulated within limits not precisely defined may not be doubted. The statute now under review is of . . . [this] character. It is of narrow scope, dealing with the single class where the act or thing constituting the contempt is also a crime in the ordinary sense. It does not interfere with the power to deal summarily with contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, and is in express terms carefully limited to the cases of contempt specifically defined. Neither do we think it purports to reach cases of failure or refusal to comply affirmatively with a decree—that is, to do something which a decree commands—which may be enforced by coercive means or remedied by purely compensatory relief. If the reach of the statute had extended to the cases which are excluded a different and more serious question would arise." 266 U.S. at 66.

Prosecutions, Contempts Compared

The court proceeded to compare criminal prosecutions and proceedings for the punishment of criminal contempts, concluding that the only substantial difference was that a criminal prosecution is to punish a violation of a law, while a contempt proceeding is to punish a violation of a decree. In the latter, there is no constitutional right to trial by jury, although the Constitution guarantees that right to the defendant in criminal cases. "The statutory extension of this constitutional right to a class of contempts which are properly described as 'criminal offenses' does not, in our opinion, invade the powers of the courts as intended by the Constitution or violate that instrument in any other way." 266 U.S. at 67. The court also found that the provisions of the Clayton Act providing jury trials in indirect criminal contempt proceedings were mandatory, rather than permissive. "The intent of Congress in adopting the provision was to give to the ac-

cused a right of trial by jury, not merely to vest authority in the judge to call a jury at his discretion." 266 U.S. at 70.

In analyzing these sections of the Criminal Code, it is necessary to determine when they will be applied by the courts to afford the accused a right to jury trial in contempt proceedings. In the first place, it should be noted that these provisions do not declare that the violation of a judicial order is a crime. *Myers v. United States*, 264 U.S. 95, 44 S.Ct. 272, 68 L.Ed. 577 (1924). In other words, a person charged with the disobedience of a judicial order is not within the protection of Section 3691 unless his acts also constitute a criminal offense under federal or state law. The violation of a state statute is sufficient, if the violative act or omission is declared to be a crime in the state where the act is done or omitted. See *Michaelson v. United States, supra.* Further, the provisions do not apply to suits brought by the United States, nor do the limitations on the punishment of contempts contained in Section 402 apply to such suits; the provisions of the Criminal Code are limited to prosecutions for contempt arising out of cases instituted by private litigants. *Hill v. United States ex rel. Weiner*, 300 U.S. 105, 57 S.Ct. 347, 81 L.Ed. 537 (1937); *United States v. United Mine Workers*, 330 U.S. 258, 311, n.2, 67 S.Ct. 677, 91 L.Ed. 884 (1947) (concurring opinion). See *Forrest v. United States*, 277 Fed. 873 (9th Cir. 1922), cert. denied, 258 U.S. 629, 42 S.Ct. 462, 66 L.Ed. 799 (1922). Further, contempts which are committed in the face of the court or so near thereto as to obstruct the administration of justice are expressly exempted from the operation of the statutes. *Michaelson v. United States, supra.*

Pleading and Practice

One Proceeding for Civil and Criminal Contempt

The distinction between civil and criminal contempt proceedings, the former being a continuation of the civil action while the latter is a separate proceeding at law, is regarded by some as serving the purpose of informing the defendant of the nature of the proceeding being brought against him. After the *Gompers* case, emphasizing the distinction in procedural and substantive matters, there was some question whether the same proceeding would serve for civil and criminal contempts. See Moskovity, *Contempt of Injunctions, Civil and Criminal*, 43 Colum. L. Rev. 780, 814-15 (1943). The question was finally decided in *United States v. United Mine Workers, supra:*

> "Common sense would recognize that conduct can amount to both civil and criminal contempt. The same acts may justify a court in resorting to coercive and punitive measures. Disposing of both aspects of the contempt in a single proceeding would seem at least a convenient practice. . . . Even if it be better practice to try criminal contempt alone and so avoid obscuring the defendant's privileges in any manner, a mingling of civil and criminal contempt proceedings must nevertheless be shown to result in substantial prejudice before a reversal will be required." 330 U.S. at 298-300.

Mr. Justice Rutledge dissented on the ground that the joining of civil and criminal proceedings was improper:

> "I do not think the Constitution contemplated that there should be in any case an admixture of civil and criminal proceedings in one. Such an idea is altogether foreign to its spirit. There can be no question that contempt power was conferred adequate to sustain the judicial function, in both civil and criminal forms. But it does not follow that the Constitution permits lumping the two together or discarding for the criminal one all of the procedural safeguards so carefully provided for every other such proceeding.
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> ". . . They [the founders] could not have conceived that procedures so irreconcilably inconsistent in many ways could be applied simultaneously." 330 U.S. at 364-365.

Prior to this decision, however, one commentator pointed out that "if both criminal and civil contempt are embraced in one proceeding, the criminal aspect dominates for purposes of procedure." Moskovity, 43 Colum. L. Rev. at 815. Under his analysis, the more demanding requirements of criminal procedure will prevent prejudicial effect on the defendant.

Notice and Hearing

Rule 42 of the Federal Rules of Criminal Procedure provides for the disposition of criminal contempt proceedings. The first section authorizes summary proceedings "if the judge

certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." Subsection (b) requires notice and hearing for all other criminal contempt proceedings. It provides for notice, which shall state the time and place of the hearing and the essential facts constituting the criminal contempt charged and must describe the conduct as such. Further, the rule requires a reasonable time allowance for the preparation of the defense. The notice may be given orally by the judge in open court in the presence of the defendant, or by an order to show cause or an order of arrest where the United States attorney or an attorney appointed by the court applies therefor.

Rule 42(b) also provides that the judge is disqualified from presiding at the trial or hearing where the conduct charged involves disrespect to or criticism of the judge, except with the defendant's consent.

Evidence

The nature and degree of proof required to support a contempt judgment, other than that committed in the presence of the court, depends upon the type of proceeding. In civil proceedings a "heavy" burden of proof rests upon the party urging the contempt, something more than a mere preponderance of evidence being necessary. *Kansas City Power & Light Co. v. N.L.R.B.*, 137 F.2d 77 (8th Cir. 1943). On the other hand, there is no presumption in favor of the contemnor's innocence in civil proceedings, and so proof beyond a reasonable doubt is not required. *Coca Cola Co. v. Feulner*, 7 F.Supp. 364 (S.D. Tex. 1934). In criminal contempts, however, the contemnor is presumed to be innocent until proven guilty, and guilt must be shown beyond a reasonable doubt. *Gompers v. Buck Stove & Range Co., supra; Russell v. United States*, 86 F.2d 389 (8th Cir. 1936). See also *United States v. United Mine Workers, supra* (dicta).

The privilege against self-incrimination is, as noted above, applicable to criminal contempt proceedings.

Defenses

Advice of counsel, where honestly given, may be a good defense in criminal contempt proceedings, although it is not in civil proceedings. *In re Eshay*, 122 F.2d 819 (3d Cir. 1941). It will at least serve to mitigate the punishment in criminal contempt proceedings. *Tornanses v. Melsing*, 106 Fed. 775 (9th Cir. 1901).

Ordinarily, inability to obey the order of the court is a complete defense. *United States v. Bryan*, 94 L.Ed. 884, 70 S.Ct. 724, 333 U.S. 323.

Lack of jurisdiction to enter the order disobeyed in the alleged contempt apparently is a good defense, if by "lack of jurisdiction" is meant lack of power in the court to decide the case in which the order was issued. In that situation, the court's decree is a nullity and subject to collateral attack. McClintock, Equity § 40 (2d Ed. 1948). However, the Supreme Court has ruled that a court has jurisdiction to issue a restraining order to preserve the *status quo* pending the determination of its power to render a decision on the merits. Violation of the order pending that determination constitutes a contempt. In the *United Mine Workers* case, the court declared:

> "In the case before us, the District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief. The defendants, in making their private determination of the law, acted at their peril. Their disobedience is punishable as criminal contempt.
>
> "Although a different result would follow were the question of jurisdiction frivolous and not substantial, such contention would be idle here. . . .
>
> "Proceeding further, we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued." 330 U.S. at 293.

The reasons behind this doctrine were stated in *United States v. Shipp*, 203 U.S. 563, 27 S.Ct. 165, 51 L.Ed. 319 (1906):

> ". . . But even if the circuit court had no jurisdiction to entertain Johnson's petition, and if this court had no jurisdiction of the appeal, this court and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it. . . . Until its judgment declining jurisdiction

> should be announced, it had authority from the necessity of the case, to make orders to preserve the existing conditions and the subject of the petition. . . ." 203 U.S. at 573.

"Lack of jurisdiction" in its more common meaning in equity—that the court should not have exercised its power—is not a defense to a charge of contempt for violation of a decree rendered in the case. Such decree is not void, and must be obeyed unless reversed on appeal to a higher court.

In addition to strict defenses, the courts have also allowed evidence of good faith to mitigate the punishment. Thus, the court, in *Cooke v. United States*, 267 U.S. 517, 538, 45 S.Ct. 390, 69 L.Ed. 767 (1925), noted that in certain cases the intention with which the acts were committed had an important bearing upon the degree of guilt of the contemnor and the punishment which should be imposed, and ruled that the trial court could not exclude evidence in mitigation.

Persons Liable

Any person may be liable for punishment for his contumacious conduct in the presence of the court or so near thereto as to obstruct the administration of justice, whether he be a party to a case before the court or not. Where the contempt charged is the violation of, or resistance to, an order of the court, however, it becomes necessary to determine whether the person charged with the contempt is bound by the order or can be held in contempt for resistance to the order.

If properly served, any party to the proceedings in which an order is issued comes within the scope of the order and is bound thereby, even if he does not have actual notice of the issuance of the order. The real problem arises where the contempt charged is the conduct of a stranger to the proceedings. In *Pettibone v. United States*, 148 U.S. 197, 13 S.Ct. 542, 37 L.Ed. 419 (1893), the court held that an individual cannot be held liable for the violation of a restraining order unless he has notice or is chargeable with notice that the order has been issued or entered, or at least that application therefor had been made.

Rule 65(d) of the Federal Rules of Civil Procedure provides for the form and scope of an injunction:

> "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

Even before the adoption of the Federal Rules, the courts apparently felt that an injunction should not bind the public at large. In *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930), Judge Learned Hand held that a restraining order is not binding upon a stranger to the action, even though he had notice of the order, unless he is in privity with persons named in the order. The apparent reasoning of Hand is that the stranger is entitled to his day in court as to his rights in the original proceeding. In 1934, the Supreme Court considered the question of the binding effect of an injunction expressly directed against "all persons to whom notice of the order of injunction should come." *Chase National Bank v. City of Norwalk, Ohio*, 291 U.S. 431, 54 S.Ct. 475, 78 L.Ed. 894 (1934). There it was said:

> "The City alone was named as defendant. No person other than the City was served with process. None came otherwise before the courts. . . . It is true that persons not technically agents or employees may be specifically enjoined from knowingly aiding a defendant in performing a prohibited act if their relation is that of associate or confederate. Since such persons are legally identified with the defendant and privy to his contempt, the provision merely makes explicit as to them that which the law already implies. . . . But by extending the injunction to 'all persons to whom notice of the injunction should come,' the District Court assumed to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law." 291 U.S. at 436-37.

In addition, the Supreme Court has held that the injunction cannot be extended beyond the

scope allowed by Rule 65 (d) to bind persons not specified in that Rule. See *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 65 S.Ct. 478, 89 L.Ed. 661 (1945) (labor injunction).

Disobedience–Resistance Distinction

It has been suggested that a distinction between disobedience of an order of the court and resistance to such an order must be made, the limitations of Rule 65 (d) and of the *Pettibone* and *Alemite* cases applying only to disobedience. See 10 Vand. L. Rev. 831, 838 (1957): "The theory here is that no person, even though a stranger to the original action and order itself, should be allowed deliberately to prevent its execution." This position finds support in *In re Reese*, 107 Fed. 942 (8th Cir. 1901); and *Garrigan v. United States*, 163 Fed. 16 (7th Cir. 1908), *cert. denied*, 214 U.S. 514, 29 S.Ct. 696, 53 L.Ed. 1063 (1909). *Cf. In re Rice*, 181 Fed. 217 (C.C.M.D. Ala. 1910). In the *Garrigan* case the court, referring to an injunction, said that a stranger to the action

> "is bound, alike with other members of the public, to observe its restrictions when known, to the extent that he must not aid or abet its violation by others, nor set the known command of the court at defiance, by interference with or obstruction of the administration of justice. . . ." 163 Fed. at 20.

Injunction in Race Cases

The injunction has been used in race relations cases to achieve two purposes. The primary purpose has been the use of a mandatory injunction requiring the discontinuance of racial discrimination by maintaining segregation in the public schools. See, *e.g.*, *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, 1 Race Rel. L. Rep. 11 (1955); *Davis v. County School Board of Prince Edward County*, 1 Race Rel. L. Rep. 82 (E.D. Va. 1955) (". . . the defendants be, and they are hereby, restrained and enjoined from refusing on account of race or color to admit to any school under their supervision any child qualified to enter such school. . . ."). No contempt cases have resulted from violations of these orders.

In addition, the injunction has been used to prevent interference with the efforts of a school board, whether under a court order or not, to integrate the public schools under their supervision. In *Brewer v. Hoxie School District*, 238 F.2d 91, 1 Race Rel. L. Rep. 1027 (8th Cir. 1956), the Eighth Circuit approved a restraining order against certain named persons whose conduct was said to be "directed to prevent the plaintiff school board members from carrying out their duty as state officials to put into effect a desegregation program in public schools" (1 Race Rel. L. Rep. 1035), although the school board was not under court order to end racial segregation in the public schools under its supervision. The court established its power to issue the injunction under federal-right jurisdiction and under 42 U.S.C.A. § 1985(3), dealing with conspiracy to interfere with civil rights.

The injunction has been used more extensively to restrain interference with the efforts of the school board to carry out a court order to desegregate. (See Arkansas and Nashville orders, *supra* at pp. 962 and 979). The conviction of John Kasper of indirect criminal contempt for a violation of a temporary restraining order of this nature indicates the type of conduct which may be reached by such an injunction. *McSwain v. Board of Educ. of Anderson County*, 1 Race Rel. L. Rep. 872, 1045 (E.D. Tenn. 1956), *aff'd sub nom., Kasper v. Brittain*, 245 F.2d 92, 2 Race Rel. L. Rep. 792 (6th Cir. 1957) *Cert denied*, 26 U.S.L.W. 3109 (1957). The restraining order read as follows:

> "It is ordered and decreed by the Court that the aforementioned persons [including Kasper], their agents, servants, representatives, attorneys, and all other persons who are acting or may act in concert with them be and they are hereby enjoined and prohibited from further hindering, obstructing, or any wise interfering with the carrying out of the aforesaid order of the Court [requiring desegregation], or from picketing Clinton High School, either by words or acts or otherwise." 1 Race Rel. L. Rep. at 876.

After service of this order, Kasper made a speech to a crowd of people, in which he asserted that neither the restraining order nor the order of the court requiring desegregation had to be obeyed. This conduct was held to be a violation of the order, and Kasper was convicted of indirect criminal contempt. The Sixth Circuit noted that a federal court is "always empowered to enforce its decrees by orderly process." (2 Race Rel. L. Rep. 795). In dealing with the

use of the injunction as a violation of the constitutional right to freedom of speech, the court said:

> "The speech here enjoined was clearly calculated to cause a violation of law and speech of that character is not within the protection of the First Amendment. [Citations omitted.]
>
> ". . . It was advocacy of immediate action to accomplish an illegal result, sought to be avoided by the restraining order. The clear and present danger test . . . is here met by the mob violence that followed the urgings of the appellant." 2 Race Rel. L. Rep. at 794.

Order Made Permanent

This temporary restraining order was subsequently made permanent (1 Race Rel. L. Rep. 1045), and an order of attachment against Kasper and seventeen other defendants was issued by the district court for a violation thereof. *McSwain v. Board of Educ. of Anderson County*, 2 Race Rel. L. Rep. 26 (E.D. Tenn. 1956). In a criminal contempt proceeding, seventeen of the defendants were brought to trial for their allegedly contumacious activity, and were tried by a jury, apparently under 28 U.S.C.A. § 3691 (see *supra*). The court charged the jury as to the requisites of proof required for a conviction:

> "1. It must appear that the defendants had actual knowledge that the injunction had been issued and had a reasonable understanding of what they were forbidden to do. Actual notice means that the issuance of the injunction was brought to their attention as a fact. A reasonable understanding of what they were forbidden to do means that they must have understood that it forbade them to enter into an agreement with defendant Kasper to violate the injunction; also that it forbade them to interfere with integration at Clinton High School.
>
> "2. The second requisite in the pattern of proof is, that the defendants did enter into an agreement with Kasper to interfere with integration. . . . Acting in concert, therefore, is construed as acting pursuant to an agreement, which is another way of stating the charge as that of acting in concert with Kasper. . . .
>
> "3. The third requisite is proof that a defendant, or defendants, who conspired with Kasper hindered, obstructed or interfered with integration in one or the other of the ways charged against them. . . ." *U.S. v. Kasper*, 2 Race Rel. L. Rep. 795 at 797 (1957).

The court, explaining the requirement that the defendants have actual notice of the injunction, discussed the scope of injunctions generally in language which seems to support the view that all members of the public having actual notice of the injunction are liable for contempt for resistance to the order.

> ". . . an injunction is not binding on the public generally. It is binding on those named in it. It is also binding on those persons who have actual knowledge of its having been issued and knowledge of what has been forbidden by the injunction. It is not binding on anyone else. . . ."

However, as to the specific injunction in the instant case, the court charged:

> "Re-examination of the language of the injunction emphasizes the further requirement which must be proved before the injunction becomes operative against these defendants. They do not come within the direct prohibitions contained in the injunction. That which is forbidden to them is action in concert with those named specifically." 2 Race Rel. L. Rep. at 801.

Punishment

Several sections of the Criminal Code provide for punishment of contempts. In Section 401, the basic federal contempt statute, a federal court is given power to punish "by fine or imprisonment, at its discretion." In *Ex Parte Robinson, supra*, the court declared that the predecessor of Section 401 was a limitation on the manner in which the contempt power could be exercised, and as such, negatived all other modes of punishment except fine or imprisonment. Section 402, applicable where the contumacious act or omission is also a criminal offense provides for punishment "by fine or imprisonment, or both." This section continues:

> "Such fines shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged,

be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States, in case the accused is a natural person, exceed the sum of $1,000, nor shall such imprisonment exceed the term of six months."

It should be noted that this section does not apply to direct contempts, nor "to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of the United States." See *Hill v. United States ex rel. Weiner*, 300 U.S. 105, 57 S.Ct. 347, 81 L.Ed. 537 (1937).

In *United States ex rel. Brown v. Lederes*, 140 F.2d 136 (8th Cir. 1944), *cert. denied*, 322 U.S. 734, 64 S.Ct. 1047, 88 L.Ed. 1568 (1944), it was pointed out that in suits brought by the United States the only limits on the discretion of the court as to punishment for contempt are those contained in Amendment 8 of the United States Constitution relating to cruel and unusual punishments.

Excessive Punishment

In *Kasper v. Brittain, supra*, the contention was made that the sentence of one year was excessive. The Sixth Circuit, without discussing the effect of Section 402, said:

> "The contention that the sentence imposed upon the appellant was excessive is, likewise, rejected. Punishment is not 'cruel and unusual,' unless it is so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice." 2 Race Rel. L. Rep. at 795.

The reason for sustaining a sentence in excess of the six-months limitation of Section 402 is not clear. It may be that the court felt that the contemptuous conduct was not within the terms of that section, but it would seem that his conduct could have been regarded as inciting to unlawful mob violence, which may be a criminal offense under the laws of the state or the United States. Further, the United States government was not a party. The provisions of Section 402 were apparently deemed applicable in the later action, *United States v. Kasper, supra*, involving a violation of the same order by different activities of the defendants, since the contempt proceedings in that action were held in conformity with usual criminal practice.

The *Gompers* case, *supra*, discusses the purpose of fine or imprisonment. In civil proceedings, fine or imprisonment is designed to coerce the action required or to compensate the injured party for the damage he has suffered by reason of the contumacious act. In criminal proceedings, on the other hand, the fine or imprisonment is for the purpose of vindicating the dignity and authority of the court and to deter further contumacy. See also *United States v. United Mine Workers, supra*. In 1947, the Supreme Court again found itself faced with the problem of the purpose of the fine or imprisonment and the use of both for punishment and coercion in the same proceeding. *Penfield v. Securities and Exchange Commission*, 330 U.S. 585, 67 S.Ct. 918, 91 L.Ed. 1117 (1947). In that case the contemnor had, in violation of a *subpoena duces tecum* issued by the SEC, refused to produce certain documents, and the trial court had fined him for that refusal. The court of appeals substituted imprisonment for the fine, using the imprisonment to coerce the production of the documents. The Supreme Court affirmed, saying:

> "We assume, *arguendo*, that this statute allowing fine or imprisonment governs civil as well as criminal contempt proceedings. If the statute is so construed, we find in it no barrier to the imposition of both a fine as a punitive exaction and imprisonment as a coercive sanction, or *vice versa*. That practice has been approved. [Citations omitted]. When the court imposes a fine as a penalty, it is punishing yesterday's contemptuous conduct. When it adds the coercive sanction of imprisonment, it is announcing the consequences of tomorrow's contumacious conduct. At least in that situation the offenses are not the same. And the most that the statute forbids is the imposition of both fine and imprisonment for the same offense." 330 U.S. at 594.

There are several race relations cases which illustrate the use of a fine in civil contempt proceedings. *Ex parte National Association for the Advancement of Colored People*, 91 So.2d 214, 2 Race Rel. L. Rep. 177 (Ala. 1956) *cert. granted*, 2 Race Rel. L. Rep. 779 (1957); *Williams v. National Association for the Advancement of Colored People*, 2 Race Rel. L. Rep. 181 (Superior Court, Ga. 1956); *Gainer v. School Board of Jefferson County, Alabama*, 135 F.Supp. 559, 1 Race Rel. L. Rep. 138 (N.D. Ala.

1955). In the two state court decisions involving the NAACP, the contempt charged was refusal to turn certain documents over to state officials, and large fines were imposed to coerce the production of such papers. The Alabama Supreme Court, discussing whether the contempt proceeding was civil or criminal, looked to the purpose of the fines:

> "The $10,000.00 fine was coercive because it gave the petitioner a right to have the fine set aside after full compliance with the order to produce. The $100,000.00 fine was coercive because the petitioner had five days within which to comply with the court's order or to be fined said amount. Neither fine apparently was severe enough or the petitioner would have produced the documents within the time allowed instead of offering partial compliance with the court's order on the last day of grace." 2 Race Rel. L. Rep. at 179.

The *Gainer* case involved the use of a fine to compensate the plaintiffs for damages caused by violation of the court order. In that case the defendant school board had been enjoined in 1945 as a result of plaintiff's original action, from discriminating because of race or color in the payment of salaries to teachers. However, such discrimination had continued, and the plaintiffs asked that the defendant school board be held in civil contempt and that the damages caused by failure of the board to equalize salaries be assessed against defendant by fine payable to plaintiffs. The court found that the civil contempt case was made out, but held further that a compensatory fine could not be assessed, on the ground that to hold the board, as a corporate entity, liable would be to allow a suit against the State of Alabama without its consent. In reaching this decision the court said:

> "Anything that would serve as a bar to the establishment by petitioners of a liability at law or in equity against the Board for a compensatory money judgment in the absence of a violation of an injunction would also bar a recovery thereof in a civil contempt proceeding based upon the violation of an injunction." 1 Race Rel. L. Rep. at 144.

For a discussion of the Eleventh Amendment aspects of this case, see 2 Race Rel. L. Rep. 757 (1957).

Extraordinary Writs

If the coercive sanctions of fine or imprisonment fail to induce the contemnor to cease contemptuous action in the form of refusal to obey a decree of the court, statutes authorize the federal courts to employ the supplementary enforcement methods traditional in equity jurisprudence. Thus, 28 U.S.C.A. § 1651 (1950) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." More specifically, Rule 70 of the Federal Rules of Civil Procedure, provides:

> "If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order of judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk."

Under this Rule, the federal courts, though acting in cases calling for relief of an equitable nature, are empowered to issue decrees with *in rem* effect or, upon petition of the plaintiff, to effectuate *in personam* decrees by issuing writs of sequestration and assistance. In traditional equity practice, these writs could be resorted to if the defendant persisted in refusal to obey the court's decree even after confinement for contempt.

A different type of procedure which could be resorted to as a means of preventing any viola-

tion of a federal court decree which would involve a breach of the peace is made available to federal judges by 18 U.S.C. § 3043 (1953), 62 Stat. 816 (1948):

> "The justices or judges of the United States . . . shall have the like authority to hold to security of the peace and for good behavior, in cases arising under the Constitution and laws in the United States, as may be lawfully exercised by any judge or justice of the peace of the respective States, in cases cognizable before them."

II. Obstruction of Justice

Relation to the Contempt Power

A complementary means of effectuating the operation of the federal courts, by protecting the functioning of the judicial process and the law enforcement machinery from obstruction, may be derived from chapter 73 of the Criminal Code, entitled "Obstruction of Justice." 18 U.S.C.A. §§ 1501-1508. These provisions had their origin in Section 2 of the Act of March 2, 1831 (which itself had antecedents in the Act of April 30, 1790, 1 Stat. 117) and have been considerably broadened by subsequent amendment. Following the first part of the 1831 Act which outlined the scope of the federal courts' contempt power (see *supra*, p. 1053), the second section provided for prosecution, by indictment, of persons who by threats or force corruptly attempt to influence, impede or obstruct the due administration of justice in the courts of the United States. The circumstances of its enactment might indicate that this section was intended to provide punitive measures against various activities in obstruction of justice which would not fall within the narrowed contempt power as defined in the first section. See *Ex parte Poulson*, 19 Fed. Cas, 1205 at 1208, No. 11, 350 (1835); argument of defendant in *Ex parte Savin*, 131 U.S. 267 at 275, 9 S.Ct. 699, 33 L.Ed. 150 (1889). A later version of the obstruction of justice statute was invoked for that purpose as a sequel to the celebrated contempt proceedings in *Nye v. United States*, *supra*.

In that case the accused, who was not a party to the federal court litigation in reference to which the alleged contempt arose, undertook voluntarily to act in the interest of the party defendant by fraudulently inducing the party plaintiff, "an illiterate man, feeble in mind and body," to dismiss his suit. For this misbehavior, which clearly obstructed the administration of justice, Nye was summarily punished by the federal district court for contempt. As has been recounted above, the Supreme Court subsequently ruled that Nye's action could not be punished as a contempt under 18 U.S.C.A. § 401 because, since it occurred over 100 miles from the courtroom, it was not misbehaviour in the presence of the court or so near thereto as to obstruct the administration of justice. However, the Supreme Court's opinion contained a suggestion to the federal law enforcement officers in Nye's district:

> "The conduct of [accused] was highly reprehensible. It is of a kind which corrupts the judicial process and impedes the administration of justice. But the fact that it is not reachable through the summary procedure of contempt does not mean that such conduct can proceed with impunity. Section 135 of the Criminal Code, a descendant of § 2 of the Act of Mar. 2, 1831, embraces a broad category of offenses. And certainly it cannot be denied that the conduct here in question comes far closer to the family of offenses there described than it does to the more limited classes of contempts described in § 268 of the Judicial Code. . . . If petitioners can be punished for their misconduct, it must be under the Criminal Code where they will be afforded the normal safeguards surrounding criminal prosecutions." 313 U.S. at 52-53.

In pursuance of this suggestion, Nye was indicted for wilful and corrupt obstruction of justice, and was convicted on the showing that he had used unlawful means to procure a dismissal of the suit in the federal court, with the result that delays and obstructions to the due administration of justice were created. The conviction was upheld by the Circuit Court of Appeals, 137 F.2d 73 (1943) and certiorari was denied by the Supreme Court. Though the extent of Nye's final sentence is not disclosed in the report of the case on appeal, it is to be noted that while his contempt punishment had been set at $1000 in fines, he was subject to

punishment of up to $5000 in fines and five years imprisonment for obstructing justice.

Obstructive and Contemptuous

While these Criminal Code provisions serve to provide a penalty for conduct not within the court's contempt power, it is obvious that some of the acts constituting the crime of obstructing justice could also be punishable as contempts, if they took place in the presence of the court or were in disobedience or resistance to the court's decrees: *Ex parte Savin, supra* (attempt to intimidate and to bribe a witness in room and hall immediately adjacent to courtroom while court was in session); *Ex parte Cuddy,* 131 U.S. 280, 9 S.Ct. 703, 33 L.Ed. 154 (1889) (attempt to influence a juror in pending case); *Sharon v. Hill,* 24 Fed. 726 (C.C.D. Cal. 1885) (drawing gun in court and threatening life of opposing counsel). As pointed out in *United States v. Terry,* 41 Fed. 771 at 773 (N.D. Cal. 1890), in both the *Savin* and *Cuddy* cases, the defendants were punished for contempt and thereafter prosecuted under the criminal statute for the same actions. In the *Terry* case, defendant was convicted of knowingly and willfully resisting and obstructing, by assaulting, beating or wounding, a federal court marshal in the execution of an order of the court to remove defendant from the courtroom because of her gross misbehaviour there, "consisting of loud, boisterous and insulting language by her addressed to the circuit justice, then presiding in said court. . . ." 41 Fed. at 772. Defendant had already been cited and punished for contempt of court for those same actions, but the court observed: "Whenever the statute makes an act that constitutes a contempt also a crime, the fact that the party has been adjudged guilty of contempt, and punished therefor, is no bar to a prosecution under the criminal statute. . . ." But it was pointed out that the fact of previous punishment for contempt ". . . is to be considered . . . in so far as it is just and proper to consider it in imposing punishment for the crime. . . ." 41 Fed. at 773. No violation of the double jeopardy prohibition would seem to be involved in subjecting a person to both forms of punishment for the same act, inasmuch as a single act would constitute two independent offenses against two separate sources of authority. See *supra,* p. 1056; de Valpine, *The Irreducible Summary Contempt Power,* Boston Bar Jour. (June 1957) 12.

Actions Constituting Obstruction

In their present form, the obstruction of justice statutes cover a varied "family of offenses", including obstruction of process servers (§ 1501) or of extradition agents (§ 1502), influencing of jurors by written communications (§ 1504), influencing or injuring witnesses before federal departments or agencies or legislative committees (§ 1505), stealing or falsifying records or processes of federal courts (§ 1506), and recording or observing jury proceedings by persons not members of the jury (§ 1508). The two most significant provisions, for purposes of the present discussion are sections 1503 and 1507, which are as follows:

1503: "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

1507: "Whoever, with the intent of interfering with, obstructing, or impeding the

> administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than $5,000 or imprisoned not more than one year, or both.
>
> "Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt."

Section 1503 Interpreted

Section 1507, not having come into the Criminal Code until 1950, does not appear to have been interpreted in judicial decisions. However, Section 1503 and corresponding provisions in earlier statutes have frequently been before the courts for construction.

Prosecutions under all sections of Chapter 73 are, of course, criminal proceedings, in which, in contrast with contempt proceedings, the accused, "will be afforded the normal safeguards surrounding criminal prosecutions," *Nye v. United States*, 313 U.S. at 53, including presumption of innocence, right to jury trial, right to be represented by counsel, and so on. Further, inasmuch as they are criminal statutes, these provisions must be strictly construed in favor of the accused. *United States v. Scoratow*, 137 F.Supp. 620 (W.D. Pa. 1956) (holding that making threats against a witness in an F.B.I. investigation did not constitute an offense under Section 1503 because the F.B.I. is not a judicial arm of the government and its proceedings are therefore not within the term "administration of justice").

Even under the strict construction requirement, the courts have defined the offenses declared by Section 1503 in very inclusive terms. Most of the prosecutions under this section and its antecedents have been directed against intimidation and bribery of witnesses, tampering with jurors, destroying evidence of guilt, or interfering with officers of the court in the discharge of their duties. These offenses are (except for the destruction of evidence) specifically mentioned in the statute, and are of the type which usually occur while a matter is being investigated before a grand jury or while a case is in the process of trial before a court—prior to the return of an indictment or the rendition of a judgment or decree.

Acts Subsequent to Judgment

However, numerous acts which interfere with the enforcement of the judgment or decree when entered would seem to fall within the scope of the final clause of Section 1503: "[Whoever] corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs or impedes, or endeavors to influence, obstruct or impede, the due administration of justice, shall be fined etc. . . ." This clause has been described as "an omnibus provision", and is declared to be "all-embracing and designed to meet any corrupt conduct in an endeavor to obstruct or interfere with the due administration of justice." *United States v. Solow*, 138 F.Supp. 812, 814 (S.D. N.Y. 1956). See *Catrino v. United States*, 176 F.2d 884 at 887 (9th Cir. 1949). Another court has said: "The statute was enacted for the purpose of safeguarding the due administration of justice, which includes insuring the purity of a trial in progress against all wilfull and corrupt attempts to emasculate it. . . ." *United States v. Mannarino*, 149 F.Supp. 351 (W.D. Pa. 1956). Further, the scope of the Act is not specifically limited by the word "corruptly." Rather, under this statute, "any endeavor to impede and obstruct the due administration of justice in the inquiries specified is corrupt. To construe the acts as requiring that such an effort should be accompanied by payment or promises of payment of money would quite unreasonably restrict the obvious purpose of the legislation." *Bosselman v. United States*, 239 Fed. 82, 86 (2d Cir. 1917). See *Broadbent v. United States*, 149 F.2d 580 (10th Cir. 1945). Another court has said that, in this connection, "corruptly" means "for an improper motive". *Martin v. United States*, 166 F.2d 76, 79 (4th Cir. 1948).

In *Taylor v. United States*, 2 F.2d 444 (7th Cir. 1924) the defendants, were indicted for a conspiracy (among other things) to obstruct and impede a federal district court in the due administration of justice. In the course of a railroad shopmen's strike, the court had issued an injunction prohibiting hindrance or obstruction

of the operation of the railroad and destruction of railroad property. Defendants allegedly dynamited and destroyed two of the railroad's bridges in violation of the order, these acts being the basis of the indictment. They contested the sufficiency of the indictment on the ground that it failed to charge the commission of an offense, but the Circuit Court of Appeals, in affirming the conviction of defendants, declared: "It is hardly necessary to consider the urge [sic] that a violation of the injunctional order does not constitute an obstruction or an impediment to the due administration of justice, as that term is used in Section 135 of the Criminal Code. . . ." The court then referred to *Pettibone v. United States*, 148 U.S. 197, 13 S.Ct. 542, 37 L.Ed. 419 (1893) as disposing of the question. There the indictment was held to be insufficient because it failed to allege that the defendants had notice of the injunction, but the Court considered the case on the theory that if the indictment had contained such allegation it would have properly charged defendants with the criminal offense of conspiracy to obstruct the administration of justice by violation of a federal court injunction.

Relation to Proceeding

The statute has consistently been construed to require that the act charged as obstruction "must be in relation to a proceeding pending in the federal courts." *United States v. Scoratow*, 137 F.Supp. at 621; *United States v. Perlstein*, 126 F.2d 789, 793 (3rd Cir. 1942). In this regard it has been held that a case is not pending in a court until a complaint has been filed. *United States v. Bittinger*, 24 Fed. Cas. 1149, No. 14,598 (1876); *United States v. Scoratow*, 137 F.Supp. at 621. Nor is it pending after the case has been finally dismissed. *United States v. Thomas*, 47 Fed. 807 (W.D. Va. 1891). But though it is true that "the due administration of justice . . . cannot be obstructed or impeded after it has run its course," *United States v. McLeod*, 119 Fed. 416, 418 (N.D. Ala. 1902), this limitation seems not to shield the party who violates an injunction, since the judicial proceedings in which the injunction is issued should be regarded as continuing until the decree is fully enforced. See *Taylor v. United States* and *Pettibone v. United States, supra.*

In *Kasper v. Brittain* (6th Cir. 1957) 2 Race Rel. L. Rep. 792, after the county School Board had complied with the federal district court's injunction to desegregate the Clinton, Tennessee, High School, Kasper organized violent opposition to the attendance of Negroes at the school and urged people to impede the enforcement of the injunction. When the court issued a restraining order prohibiting Kasper from further obstructing the carrying out of the desegregation order, he publicly denounced the court's order and continued to promote resistance to the desegregation of the school. When cited for contempt for this action, Kasper argued, among other things, that "the case was closed when the original defendants [Board of Education] had complied with the court's order, so that he could not be guilty of criminal contempt for speaking against it. . . ." The federal Court of Appeals met this argument with the declaration that ". . . it must be rejected as clearly without merit. The Federal Court is always empowered to enforce its decrees by orderly process." 2 Race Rel. L. Rep. at 795.

In the *Pettibone* case, *supra*, the Supreme Court held that "knowledge is an essential ingredient of the offense," 148 U.S. at 205, and thus there would appear to be no offense of obstruction of the administration of justice in violating an injunctive order or decree unless the party so acting had knowledge or notice of the existence of the injunction. However, given the requisite knowledge or notice, "the only intent involved in the crime is the intent to do the forbidden act. The defendant must have had knowledge of the facts, though not necessarily the law, that made his act criminal." *Caldwell v. United States*, 218 F.2d 370, 372 (D.C. Cir. 1954) cert. den. 349 U.S. 930, 75 S.Ct. 773, 99 L.Ed. 1260 (1955). To constitute a criminal offense the actions of the accused need not have been effective in preventing the enforcement of the order or injunction. Not only obstructions of but also endeavors to obstruct the due administration of justice are declared by Section 1503 to be a crime. "Guilt is incurred by the trial—success may aggravate, it is not a condition of it." *United States v. Russell*, 255 U.S. 138, 143, 41 S.Ct. 260, 65 L.Ed. 553 (1921). See *Roberts v. United States*, 239 F.2d 467, 470 (9th Cir. 1956); *United States v. Brothman*, 93 F.Supp. 924, 925 (S.D. N.Y. 1950); *United States v. Solow*, 138 F.Supp. 812, 817 (S.D. N.Y. 1956).

III. Military Powers of the Executive as Related to the Courts

Discretion of Executive

It was established as early as *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803) that under the general restraints arising from the doctrine of separation of powers, when the executive department is entrusted with duties which are exercisable within the discretion of its officials, the judiciary cannot ordinarily question the propriety of the manner in which that discretion is exercised. Over a half century later, in denying a petition to restrain President Johnson from enforcing the Reconstruction Acts, the Supreme Court referred to ". . . the general principle which forbids judicial interference with the exercise of Executive discretion", and declared:

> "An attempt on the part of the judicial department of the government to enforce the performance of such [discretionary] duties by the President might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance'." *Mississippi v. Johnson*, 71 U.S. 475, 499, 18 L.Ed. 437 (1866).

However, in relation to the actions of state governors in the exercise of their power to use military force to restore law and order in the face of rioting and insurrection, the independence of the executive department from judicial control is subject to substantial restriction. The essence of this restriction is expressed in the words of a federal district court:

> "Those who founded this nation placed upon the judiciary the grave responsibility of safeguarding constitutional rights regardless of from what quarter comes the attack, and where it is established that freedom has been subverted, judicial interference is mandatory." *Parker v. Lester*, 98 F.Supp. 300, 308 (N.D. Cal. 1951). See also *Cooley v. Bergin*, 27 F.2d 930, 933 (D.C. Mass. 1928).

In the earlier history of the nation and even down through the first part of the twentieth century, the courts faced with this question tended to adhere closely to the policy underlying the separation of powers in government and to avoid interference with the use of the martial law power by state governors. See Fairman, *Martial Rule, In The Light of Sterling v. Constantin*, 19 Corn. L. Q. 20, 25-29 (1933). This hands-off attitude was characterized and confirmed by the Supreme Court's decision in a 1909 case which dismissed an action for damages brought against a former governor and National Guard officer of Colorado by one who had been imprisoned for two and a half months as an alleged inciter of violence during a labor dispute which had led to a declaration of martial law. The court, assuming that a state of insurrection had existed and that defendant, without sufficient reason, had imprisoned plaintiff in the course of putting down the violence, declared:

> "So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief. . . . When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. . . . [Plaintiff's declaration] does not disclose a suit authorized by law to be brought to redress the deprivation of any right secured by the Constitution of the United States." *Moyer v. Peabody*, 212 U.S. 78, 85-86, 29 S.Ct. 235, 53 L.Ed. 410, (1909). See also *United States ex rel. Seymour v. Fischer*, 280 Fed. 208 (D.C. Neb. 1922).

It has been said that the *Moyer* case gave some cause to conclude . . . "that on his own finding of necessity, declared in a proclamation of 'martial law', the governor might use the military arm of the State subject to no effective judicial control." Fairman, *supra* at 20.

Judicial Review of Use of Troops by Governor

Possibly in reaction against the increasingly frequent resort by governors to their military powers, see Fairman, *supra* at 29-30; Walker, *Military Law* 475 (1954), the emphasis of the Supreme Court had changed substantially when it was next called upon to rule on this problem. The more critical approach to this gubernatorial power was dramatically evidenced by the decision in *Sterling v. Constantin*, 287 U.S. 378, 53 S.Ct. 190, 77 L.Ed. 375 (1932) which, though decided twenty-five years ago, remains the basic authority in this field of the law. The case arose from the efforts of the Texas government to limit production of the oil wells so as to stem a slump in prices of petroleum products. First the governor proclaimed that a state of insurrection existed in the oil fields and declared martial law in the area, directing the National Guard commander to use troops to close the wells.

Thereafter, the State Railroad Commission, under legislative authorization, fixed production quotas, and the operators were allowed to reopen the wells. The now-reduced troop force joined civil authorities in patrolling the fields to prevent production in excess of the set quotas. Plaintiffs sued for an injunction in the federal district court against the railroad commission and the National Guard commander, on the ground that the production regulation deprived plaintiffs of their property without due process of law. A temporary restraining order was issued pending a hearing in the case, but the governor, acting under his power to execute the laws, took over the oil production regulation from the commission, and ordered the guard commander to close the wells again and allow operations only on the quota system now decreed by the governor. New pleadings were filed by plaintiffs, making the governor and his adjutant general parties to the injunction suit. In answer, they asserted that the actions taken were within the power of the governor to prevent insurrection and that the federal courts have no jurisdiction to inquire into his actions.

Nevertheless, the district court, finding that there had been no violence or disorder in the area and that the control of the civil authorities had not been overthrown, granted the injunction, and on appeal the judgment was affirmed. The Supreme Court declared:

> "Appellants assert that the [district] court was powerless . . . to intervene, and that the Governor's order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the federal government.
>
> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression." 287 U.S. at 397.

Relation Made Clear

As a result of the *Sterling* decision and of several lower federal court decisions which have subsequently sought to apply its principles, the relation between governors and the federal courts in regard to the exercise of the state executive's military powers becomes more clear. Thus, only two years after the *Sterling* case, a federal district court was able to state with assurance:

> "The following propositions, we think, must either be conceded or regarded as fairly established: That the Governor, as the chief executive officer of the state, is charged with the duty of seeing that its laws are executed, and is authorized, in the performance of that duty, when in his judgment the exigencies of the situation require, to use the military forces of the state; that his judgment as to the necessity of using the troops to execute the laws is conclusive and not subject to review; that, when there

> is a breakdown of law and order in a community, and it therefore becomes necessary to use the state troops, the means which are employed to restore law and order must necessarily be left largely to the discretion of the Governor and the commanding officer of the troops; and that, within the range of the Governor's permitted discretion, his acts are not subject to the regulation or control of the judiciary. Arbitrary and capricious acts of the Governor, and those having no relation to the necessities of the situation, may be enjoined by the courts, as any clear abuse of power by an executive may be enjoined." *Powers Mercantile Co. v. Olson,* 7 F.Supp. 865, 867-8 (D.C. Minn. 1934).

Governor's Freedom To Act

All authorities agree that whether the law of a state grants to the governor the power to use military force, and if so, under what circumstances, are matters of local law for determination by the state courts. *Sterling v. Constantin,* 287 U.S. at 396; Fairman, *The Law of Martial Rule and The National Emergency,* 55 Harv. L. Rev. 1253, 1265 (1942). And, given that power, his determination that the conditions prerequisite to its exercise are in fact present in some area of the state is conclusive on the courts. *Moyer v. Peabody* and *Sterling v. Constantin, supra.* See *Luther v. Borden,* 48 U.S. 1, 44, 12 L.Ed. 581 (1849).

The fundamental problem, in the solution of which in individual cases some difference of opinion inevitably arises, is what actions of the governor or his officers, taken in the exercise of the military power after it has been duly invoked, are subject to review by the federal judiciary.

Though it rejected the earlier view that the governor has an authority approaching in its absolute quality that of a military commander on the field of battle (See *United States ex rel. Seymour v. Fischer, supra*), the Supreme Court in the *Sterling* case clearly conceded that the governor must be accorded a broad range of discretion in determining what means are necessary to preserve or restore law and order, in the face of an emergency. Other courts have concurred in that view, both before and since 1932. *United State ex rel. Palmer v. Adams,* 26 F.2d 141, 145 (D.C. Colo. 1928); *Strutwear Knitting Co. v. Olson,* 13 F.Supp. 384, 390 (D.C. Minn. 1936). While in the last-cited case the decision went against the governor, the same federal court had refused to interfere with the same governor's use of troops in the course of a truck drivers union strike two years earlier. There the executive was accused by plaintiffs of depriving them of the right to use their trucks in the operation of their business, as a means of coercing them to agree to a strike settlement plan proposed by federal labor mediators. The court conceded that the evidence established a "substantial foundation" for the plaintiffs' charges regarding the governor's motives in the case. But the final conclusion was that: "While we may personally disagree with the Governor as to the manner in which he handled the entire situation . . . ", the court would not enjoin his use of the troops because ". . . we are not prepared to find, upon the showing made before us, that the Governor's orders have no relation whatever to the necessities of the situation with which he is confronted and fall entirely outside the range of his discretion." *Powers Mercantile Co. v. Olson, supra* at 869.

Restriction on Discretion

However, the Supreme Court has placed a positive restriction on the exercise of the executive discretion:

> "It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Sterling v. Constantin,* 287 U.S. at 400-1.

A suit involving such judicial review of the acts of the executive is not a suit against a state within the prohibition of the Eleventh Amendment. *Sterling v. Constantin,* 287 U.S. 387 at 393; *Joyner v. Browning,* 30 F.Supp. 512, 517 (W.D. Tenn. 1939). See generally on the Eleventh Amendment, 2 Race Rel. L. Rep. 757 (1957). This proposition was already established

a half of a century ago when, in an action to enjoin a state attorney general from enforcing a state law allegedly in violation of petitioner's federal constitutional rights, the Supreme Court declared:

> ". . . the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. . . . [If the act to be enforced violates the federal constitution] the officer . . . is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Ex Parte Young*, 209 (1908).

Arbitrary Action Distinguished

It is conceded even by courts which have refused to interfere with the use of the military that "arbitrary and capricious acts of the Governor, and those having no relation to the necessities of the situation, may be enjoined. . . ." *Powers Mercantile Co. v. Olson, supra* at 868; *Cox v. McNutt*, 12 F.Supp. 355, 360 (S.D. Ind. 1935). On the other hand, in the same cases the accepted view was asserted that:

> "Under military rule, constitutional rights of individuals must give way to the necessities of the situation; and the deprivation of such rights, made necessary in order to restore the community to order under the law, cannot be made the basis for injunction or redress." *Powers Mercantile Co. v. Olson, supra* (holding that plaintiff could be deprived of the use of property without due process of law). "If it becomes necessary to imprison a person, to deprive him of the right of a trial by jury, to deny him the right of habeas corpus, or to deprive him of other rights, in order to restore law and order, the military authorities are given that power." *Cox v. McNutt, supra.*

For support for these propositions the courts could point to language in *Moyer v. Peabody, supra,* which was approved by the Supreme Court in the *Sterling* case:

> "Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace." 287 U.S. at 400.

The fundamental problem has been succinctly stated:

> "Stripped of all the confusion about conclusive proclamations and executive discretion and 'martial law' powers, the federal question is simply whether the invasion of interests normally protected was, under the circumstances, arbitrary and in excess of the occasion." Fairman, *supra,* at 1270.

Limitation on Governor's Action

On several occasions the federal courts have, after reviewing the circumstances leading to actions taken by the governor or troop commanders under martial law, exercised their power to enjoin the continuation of such actions. In each instance these decisions were based on the twofold conclusion that the contested action was depriving the petitioner of his federal constitutional rights and that such deprivation was not, under the particular circumstances, reasonably necessary for the restoration of law and order, either because no violence and disruption of peace beyond the control of the civil authorities was in progress or threatened or because the action which infringed petitioner's rights was not an appropriate means of maintaining law and order against the disruptive force involved.

The specific constitutional rights protected were: the occupation and enjoyment of the use of property, *Sterling v. Constantin, supra; Strutwear Knitting Co. v. Olson, supra;* an investment in bonds issued to finance a construction project, *United States v. Phillips*, 33 F.Supp. 261 (N.D. Okla. 1940) rev'd on procedural grounds 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941); collection of a money judgment of a federal court, *United States v. Peters*, 5 Cranch 115, 3 L.Ed. 53 (1809); holding public office, *Joyner v. Browning*, 30 F.Supp. 512 (W.D. Tenn.

1939); *Miller v. Rivers*, 31 F.Supp. 540 (M.D. Ga. 1940) dismissed as moot, 112 F.2d 439 (5th Cir. 1940); voting in public elections, *Joyner v. Browning, supra.*

No Disorder Found

In the last two cases cited, the question arose out of a contest between rival political factions within a state, and the courts found no opposition to law and order in the areas threatened with or placed under military rule. Since there was no disorder to be quelled, there could be no justification for the use of the military in a manner deemed to infringe constitutional rights of individuals. In the *Phillips* and *Peters* cases, the military forces were called out to enforce the position of the state government in a contest with some agency of the federal government, again without any previous occurrence or threat of violence or disorder. That the significance of the *Peters* decisions went far beyond the protection of the rights of an individual to enforce a judgment in his favor is evidenced by an observation in the opinion of Chief Justice Marshall:

> "If the legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals." 5 Cranch at 136. For a fuller discussion of *United States v. Peters*, see 1 Race Rel. L. Rep. 476 (1956).

The *Sterling* and *Olson* cases grew out of conditions created by the economic depression of the 1930's, and in both instances the governors were held to have deprived owners of industrial enterprises of their property without due process of law by the use of the military forces ostensibly to preserve law and order. In condemning the Texas governor's use of the military force to circumvent the restraining effect of the federal district court's injunction, the Supreme Court used language which obviously could be of importance in a race relations controversy.

> "Instead of affording [plaintiffs] protection in the lawful exercise of their rights as determined by the courts, [the governor] sought, by his executive orders, to make that exercise impossible. . . . In particular, to the process of the federal court actually and properly engaged in examining and protecting an asserted federal right, the Governor interposed the obstruction of his will, subverting the federal authority. . . .
>
> ". . . If it be assumed that the Governor was entitled to declare a state of insurrection and to bring military force to the aid of civil authority, the proper use of that power in this instance was to maintain the federal court in the exercise of its jurisdiction and not to attempt to override it; to aid in making its process effective and not to nullify it; to remove, and not to create, obstructions to the exercise by the complainants of their rights as judicially declared." *Sterling v. Constantin*, 287 U.S. at 402-404.

Doctrine Reiterated

Four years later the federal district court in the *Strutwear* case, relying on authority of the *Sterling* decision, enjoined the Minnesota governor's use of the National Guard which had produced a similar effect under different circumstances. The striking employees of plaintiff's knitting mills had carried on violent mass picketing which had forced plaintiff to cease operating. After four months, with the mayor's public promise to protect plaintiff's plants and any employees who wanted to resume work, plaintiff prepared to reopen the mills but was met by a re-establishment of the mass picketing. Thereupon the mayor and sheriff called on the governor to send troops, and when National Guard officers arrived, the mayor advised the closing of plaintiff's plant until the military forces were in position to prevent injury to life and property from imminently threatened disorder.

Accordingly, the guard took possession of the plant, ordered out the employees who had returned to work, and required plaintiff to stop trying to operate. After a month under these conditions, plaintiff applied for a temporary injunction against the governor, his adjutant general and the mayor, to prevent further exclusion of plaintiff from control of his plant. Because of a dispute between the governor and the mayor regarding which official should bear the responsibility for the use of the troops at the mills, the governor actually withdrew the guard before the case was decided. Nevertheless, the requested injunction was issued, the court

reasoning that the case was not moot because the troop withdrawal was not done in recognition of plaintiff's rights and there was no assurance that the guard would not be similarly employed again if the injunction were not granted. In branding the governor's use of the military in this situation as an abuse of discretion, the court observed:

> "To say that, because the lawful use of property will incite lawless persons to commit crimes and to destroy life and property, such lawful use must be suppressed, is to say that the will of a mob, and not the Constitution of the United States, has become the supreme law of the land. . . .
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> "It is certain that while the state government is functioning, it cannot suppress disorders the object of which is to deprive citizens of their lawful rights, by using its forces to assist in carrying out the unlawful purposes of those who create the disorders, or by suppressing rights which it is the duty of the state to defend. The use of troops or police for such purposes would breed violence. It would constitute an assurance to those who resort to violence to attain their ends that, if they gathered in sufficient numbers to constitute a menace to life, the forces of law would not only not oppose them, but would actually assist them in accomplishing their objective. . . . A rule which would permit an official, whose duty it was to enforce the law, to disregard the very law which it was his duty to enforce, in order to pacify a mob or suppress an insurrection, would deprive all citizens of any security in the enjoyment of their lives, liberty, or property." *Strutwear Knitting Co. v. Olson, supra,* at 390, 391.

Prosecution of Military Commanders

In all of these instances of clash between the authority of the state executive and the federal judiciary, the matters have been settled by the governors' eventual acquiescence in the decrees of the courts. The ultimate means by which a judicial order would be enforced against a recalcitrant governor and his military commanders have not been fully tested. The most serious situation arose in the *Peters* case, in which a clash of opposing armed forces was in prospect at one time. After the governor, with the sanction of the Pennsylvania legislature, had used the militia to prevent the United States marshal from serving defendants with process for the enforcement of the district court's judgment, the marshal issued a call for an armed posse of 2000 deputies. This force was apparently to be used to break through the ring of state militiamen who surrounded the defendants' house. However, after an unsuccessful appeal to President Madison, the governor reconsidered his policy and withdrew the troops, leaving the resolution of the dispute to the orderly processes of law.

As an aftermath of this affair, it was established that the commander of state troops used for illegal purposes may be held responsible for his actions even though he merely carried out the commands of the governor. General Bright of the Pennsylvania Militia and several of his subordinate officers were indicted tried by jury and adjudged guilty of having wilfully obstructed and resisted a federal marshal attempting to serve a judicial writ. In answer to the officers' defense, the judge observed in his charge to the jury:

> "But it is contended that the defendants, standing in the character of subordinate officers to the governor and commander in chief of the state, were bound implicitly to obey his orders; and that, although the orders were unlawful, still the officer and those under his command were justifiable in obeying them. The argument is imposing, but very unsound. In a state of open and public war, where military law prevails, and the peaceful voice of municipal law is drowned in the din of arms, great indulgences must necessarily be extended to the acts of subordinate officers done in obedience to the orders of their superiors. But even there the order of a superior officer to take the life of a citizen, or to invade the sanctity of his house and deprive him of his property, would not shield the inferior against a charge of murder or trespass, in the regular judicial tribunals of the country. . . .
>
> "This is said to be a hard case upon the defendants, because, if they had refused obedience to the order of the governor, they would have been punished by the state. I acknowledge it is a hard case; but with this you have nothing to do if the law is against the defendants." *United States v.*

Bright, 24 Fed. Cas. 1232, 1237-38, No. 14,647 (C.C.D. Pa. 1809).

The officers were sentenced to prison and fined, but were soon pardoned by the President of the United States. See 1 Warren, *The Supreme Court in United States History* 374-87 (1926). The political implications of this case had been expressed by an attorney for the prosecution, who argued that the real question was ". . . whether a free government, established and administered by the people themselves, can possess sufficient energy for its own preservation." See Haines, *The Role of the Supreme Court in American Government and Politics 1789-1835*, p. 275 (1944).

Applied to Army Officer

The principle announced in the *Bright* case was subsequently applied by the Supreme Court in *Mitchell v. Harmon*, wherein a United States army officer was sued for damages by a citizen whose private property had been seized by the officer in the course of a campaign during the Mexican War. In disposing of the defendant's plea that he had merely carried out an order of his superior officer, Chief Justice Taney declared:

> ". . . the order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed. [Citations omitted] And upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify." 54 U.S. 115, 136, 14 L.Ed. 75 (1851); Winthrop, *Military Law and Precedents*, 885-8 (2d Ed. 1920).

But see Herlihy v. Donohue, 52 Mont. 601, 161 Pac. 164, 167 (1916):

> ". . . reason and common sense seem to justify the rule that the inferior military officer may defend his act against civil liability by reference to the order of his superior, unless such order bears upon its face the marks of its own invalidity or want of authority."

Use of Federal Troops by President

If a state governor fails to obey the order of a federal court to desist from the use of military force in a manner violative of an individual's federal constitutional rights, or if state authorities fail to use their power to suppress violent opposition to a court order sustaining exercise of an individual's federal constitutional rights, the armed forces of the nation may be employed to protect those rights. In the earliest years of the nation's existence, Congress authorized the President, as the chief executive officer of the federal government, to call out federal troops, when necessary, to enforce the laws of the United States and to protect the constitutional rights of its citizens. In its present form, this statute reads as follows:

> "Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion." 10 U.S.C. § 332, 70A Stat. 15 (1956).
>
> * * *
>
> "The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—
>
> (1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or
>
> (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. In any situation covered by clause (1), the State shall be considered to have denied the

equal protection of the laws secured by the Constitution." 10 U.S.C. § 333, 70A Stat. 15 (1956).

It is to be noted that these provisions do not make a request from the governor a condition to the President's power to send troops into a state in which there are obstructions "against the authority of the United States" or violence which hinders the execution of the "law of the United States" within the state. For this reason, President Cleveland justified the use of troops during the Pullman strike in 1894, over the protest of the state governor. In Section 331, which immediately precedes the sections quoted above, a request of the state legislature or governor is made a prerequisite to the use of military force by the President "whenever there is an insurrection in any state against its government. . . ." 10 U.S.C. § 331, 70A Stat. 15 (1956). President Eisenhower acted under the authority of Sections 332 and 333, rather than 331, when he ordered the use of federal troops in the Little Rock, Arkansas, situation on September 24, 1957. Under Sections 332 and 333, no request from the Governor of Arkansas for federal aid is specified as a condition of the presidential action.

Implement Constitution

These three sections of the United States Code were enacted to implement provisions in the Federal Constitution regarding the use of military forces within the nation. Section 331 implements Art. IV, Sec. 4 of the Constitution: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." Sections 332 and 333 are enactments pursuant to the constitutional grant of power to Congress ". . . to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." Art. I, Sec. 8, Cl. 15.

The original version of these code sections was enacted in 1792, 1 Stat. 264, c. 28, May 2, 1792, and revisions adopted three years later broadened the executive power by vesting in the President the sole discretion as to the use of troops when the laws of the United States were being opposed. 1 Stat. 424, c. 36, Feb. 28, 1795. Further revisions in 1861 and 1871 gave the statute substantially its present form, though the reenactment of Chapter 10 of the Code in 1956 altered the grammatical expression. In spite of its long existence, however, the statute has rarely been before the courts for interpretation. In 1922, during the course of a labor dispute, a federal district court in Ohio was asked to issue a certificate to the President that a state of insurrection requiring the use of federal troops existed, but the request was denied on the ground that the statute leaves the question of whether an insurrection exists solely to the determination of the President. *Consolidated Coal & Coke Co. v. Beale,* 282 Fed. 934 (S.D. Ohio 1922). Nearly a century earlier, the Supreme Court, in *Martin v. Mott,* had put the same construction on the section of the 1795 statute which authorized the President to call out the militia in case of threat of invasion. The court concluded: "Whenever a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts." 12 Wheat. 19 at 31-2, 6 L.Ed. 537 (1827).

"Insurrection" Defined

The content of the word "insurrection" as used in another federal statute making it a crime to incite, assist, or engage in any rebellion or insurrection against the authority of the United States or the laws thereof was explained in a federal court's charge to a grand jury, as follows:

> "Insurrection is a rising against civil and political authority,—the open and active opposition of a number of persons to the execution of law in a city or state. . . . It is not necessary that there should be bloodshed; it is not necessary that its dimensions should be so portentous as to insure probable success, to constitute an insurrection. It is necessary, however, that the rising should be in opposition to the execution of the laws of the United States and should be so formidable as for the time being to defy the authority of the United States." *In re Charge to Grand Jury,* 62 Fed. 828 at 830 (N.D. Ill. 1894).

Limitation On Troops

A limitation on the use of federal troops in the enforcement of the laws of the United States

is contained in 10 U.S.C.A. § 15 (1956 Supp.), which provides:

> "It shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress. . . ."

This statute was enacted in 1878, apparently to terminate the practice of federal marshals to call on conveniently-located units of the army to serve as posses for the suppression of violence at elections, apprehension of fugitives, and effectuation of the authority of the federal courts in other ways. Winthrop, *Military Law and Precedents*, 867 (2d Ed. 1920). The limitation here stated would appear to have no effect on the power of the President to call out troops under the specific authorizations of 10 U.S.C. §§ 331, 332 and 333. It is to be noted that Sec. 122 of the Civil Rights Act of 1957, 71 Stat. 637, by repealing 42 U.S.C. § 1993 (1952), R.S. § 1989 may have eliminated one of the sources of authority for using federal troops to enforce federal laws.

Basis of Federal Authority

As the Supreme Court has explained on several occasions, the right of the federal government to exert its authority within the boundaries of a state in order to enforce the laws of the United States rests on the nature of our federal system in which the power of two governments extends simultaneously over the same geographical territory:

> ". . . the powers of the General government and of the State, although both exist, and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. . . .
>
> "Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each State stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments." *United States v. Tarble*, 13 Wall. 397, 406, 20 L.Ed. 597 (1872).

In upholding the power of Congress to provide for the authority of federal marshals to preserve peace at state elections for members of Congress, the Supreme Court declared:

> "It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. . . . We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.
>
> "This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. 'This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land'." *Ex parte Siebold*, 100 U.S. 371, 394-395, 25 L.Ed. 717, (1880), quoted with approval in *In re Debs*, 158 U.S. 564, 578-9, 15 S.Ct. 900, 39 L.Ed. 1092 (1895).

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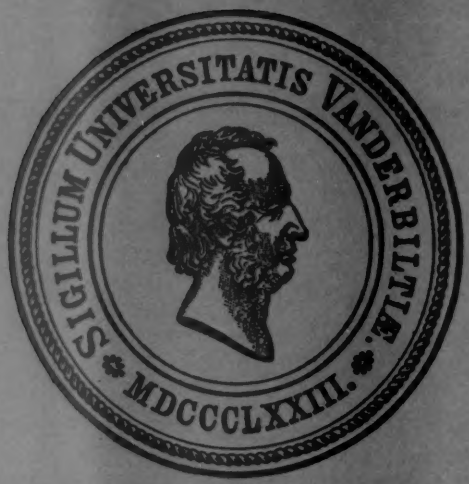
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